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JUDICIALIZATION OF ELECTION DISPUTES IN AFRICA'S INTERNATIONAL COURTS

JAMES THUO GATHII* & OLABISI D. AKINKUGBE**

I

INTRODUCTION

When elections are judicialized in Africa, national courts overwhelmingly legitimize incumbent electoral victories. When opposition candidates lose in high stakes presidential and gubernatorial elections, they seldom concede defeat without legal challenges. Claims of electoral irregularities, fraud, incompetence of electoral bodies, violence, and an unequal playing field, among other factors, transform these cases into highly contested mega-political disputes when they are judicialized.

Rather than creating new political equilibria, judicialization in national courts often results in the hegemonic preservation of incumbents. Though opposition politicians and political parties know this, they nonetheless resort to international courts in Africa, in part, because they see the courts as being at least one-step removed from a national context overwhelmingly controlled by incumbent political parties and politicians.¹ Even though international court cases do not challenge or undermine incumbency, opposition politicians and political parties nevertheless bring these cases. This is because for opposition politicians and political parties, the utility of these courts lies in the indirect benefits that these cases give them. These benefits include giving them the opportunity to air their grievances, to galvanize their supporters and to expose electoral malpractices in a forum that incumbents do not control.

This article assesses what benefit losers of high-stakes national elections think they will get from petitioning international courts in Africa. We seek to establish how judicial intervention differs before an election when there is a risk of an international law violation,² versus after an election has occurred and the result is

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1. Notably, judges in national presidential election disputes are not always unanimous in support of hegemonic preservation. This is in light of the fact there are an increasing number of dissenting judges—showing that national courts have growing judicial independence. This also shows that where there are deep divisions, incumbent politicians cannot always count on unanimous legitimation of electoral theft—perhaps the point is that judicialization of mega-political disputes takes different forms depending on the context.

2. The cases we examine from Burkina Faso and Nigeria fall into this category.

viewed as flawed.³ We address these questions by drawing on a set of disputes decided by international courts in Africa in the African Court, the Economic Community of West African States (“ECOWAS”) Community Court of Justice, and the East African Court of Justice.⁴ We supplement our analysis by discussing two important mega-political electoral disputes at the national level. Together, all the cases we analyze involve deeply divisive disputes surrounding competitive presidential, gubernatorial, and legislative elections that had significant political consequences.

Our argument is that opposition politicians judicialize presidential or gubernatorial elections in international courts to turn up the political stakes that preceded the filing of the case in court. In doing so, litigants raise awareness of electoral injustices in ways that are often foreclosed by domestic institutions. Although these international courts were not designed to deal with electoral cases or to overturn electoral results, complainants have used them to air their electoral grievances and to advance their causes. From this perspective, it is not surprising that litigants are not primarily aiming to overturn electoral losses, but rather to amplify and extend the contestation against incumbent politicians and political parties who have a stranglehold over the electoral machinery. Perhaps these litigants realize that their litigation efforts today put incumbents on notice that their future electoral misconduct will not go unchallenged.

Our approach places how and why litigants use litigation in international courts for political mobilization and contestation at the center of our analysis.⁵ For this reason, our approach differs from approaches that primarily focus on how judges determine whether to decide cases, especially those that are likely to rankle powerful politicians. Our primary inquiry is not whether these international courts have jurisdiction to decide electoral disputes, or if international court judges are happy to be involved in these cases.⁶ Rather, we center our analysis on the perspective of those who bring those cases. This means that we go into some depth about the cases we have selected to illustrate our claims. On the whole, these cases show that litigants are more likely than not to resort to Africa’s international courts when they know that filing a case in national courts is likely to be insufficient to amplify their causes and the grievances in their case. Although forays into mega-political disputes in Africa’s international courts extend

3. In this category of procedural posture is the decision from Kenya.

4. The mega-political disputes from Africa’s international courts arose from Burkina Faso, Nigeria, Kenya, and Tanzania, while the national ones are from Kenya and Malawi.

5. For more on this approach, *see generally* JAMES THUO GATHII, *THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL AND SOCIAL CHANGE* (2020).

6. *See, e.g.*, Dmitry Kurnosov, *Pragmatic Adjudication of Election Cases in the European Court of Human Rights*, 32 *EUR. J. OF INT’L L.* 255, 262, 279 (2021) (discussing whether European states have accepted the ECtHR’s jurisdiction and how ECtHR judges respond to external considerations in election cases).

beyond election disputes, this article focuses on those disputes relating to elections.⁷

Even while they do not expect a victory that will reverse an electoral loss, opposition politicians go to international courts because these politicians expect international court judges to be more likely to vindicate the violation of their rights than domestic courts controlled by incumbents. Opposition politicians know full well that the legality of elections can only be conclusively determined under domestic law in domestic courts, yet they see the benefits of keeping their grievances alive by litigating in international courts sometimes well after an electoral loss. At other times, opposition politicians and political parties go to international courts ahead of an election seeking provisional orders. The ECOWAS court has repeatedly accepted jurisdiction to decide such cases, including over imminent harms in advance of elections. On the whole, Africa's international courts do not summarily dismiss election related cases as long as they raise potential treaty violations. International court judges recognize their jurisdictional remit does not constitute appellate jurisdiction over decisions of national courts or bodies. In some African countries, aggrieved electoral losers have been vindicated by national courts in mega-political presidential disputes. The fact that this has happened in both Malawi and Kenya shows that, at least in some countries and in those specific circumstances, litigants in such disputes have a meaningful choice between going to a national court versus going to an international court. Yet, as this essay shows, even when national courts demonstrate independence in deciding in favor of opposition politicians, these same national judges may decide not to do so in other election disputes.

Notwithstanding the fact that the legality of domestic election outcomes can only be definitively determined under domestic law, Africa's international courts are emerging as more likely venues than national courts to decide mega-political disputes in favor of challengers who cite violations of treaty rights. The fact that international court judges entertain election cases and decide whether or not treaty rights have been violated has encouraged similar cases to be filed. The entire universe of cases judicializing election disputes in Africa's international courts is not that large, but it is growing. The lack of a larger sample of election related cases in Africa's international courts is accounted for by the fact that these courts have only been operational for about two decades, which is about the same time period that African countries have increasingly experienced competitive presidential and gubernatorial elections. In addition, of the eight active African international courts, only three have decided mega-political, election-related disputes. These are the East African Court of Justice, ("EACJ"), and the Economic Community of West African Community Court of Justice, ("ECCJ"), and the African Court on Human and Peoples' Rights (hereinafter the "African Court"). One of the primary reasons why the EACJ and ECCJ have been able to entertain these cases is because, unlike the African Court, they do not have a rule requiring

7. Other mega-political disputes include Zimbabwe's land reform program that came before the Southern African Development Community Tribunal in a series of cases, a little more than a decade ago.

exhaustion of domestic remedies. This means these cases can be brought more quickly and easily. Unlike its sister regional courts, the two regional African Court mega-political disputes we analyze had to overcome exhaustion of local remedies. For example, one of the disputes we discuss from Tanzania—the *Mtikila* case—involved a claim of failure to exhaust local remedies. The African Court rejected Tanzania’s jurisdictional challenge on the basis that the specific requirement of the consultation process that the government required would have created artificial barriers of access to the court.⁸ Similarly, in the *Congrès pour la Démocratie et le Progrès Bénin* (“CDP”) case also discussed in this article, the African Court found that local remedies had been exhausted and there was no other “additional ordinary judicial remedy within the judicial system of the Respondent State that . . . [the applicant] could have pursued to get redresses for his grievances.”⁹

Ultimately, there is a risk in deciding mega-political disputes, electoral or otherwise. This is clearly indicated by the removal of individual access to the South African Development Community Tribunal after it ruled against President Mugabe’s land redistribution program. Yet, notwithstanding the likelihood of backlash against them, Africa’s international courts continue to decide election related disputes arising from contentious national elections. The frequency with which Africa’s international courts accept to decide these cases goes against Ran Hirschl’s prediction that judicialization of mega-political disputes requires autonomous courts and hospitable political conditions. It is only under those conditions, Hirschl argued, that courts can be “easily enticed to dive into deep political waters.”¹⁰ The African cases decidedly demonstrate that, notwithstanding the challenges of judicial independence, Africa’s international courts nevertheless entertain mega-political disputes and do side with challengers.

This article proceeds as follows. In Part II, we discuss the contours of the judicialization of politics in the African context. Part III analyzes the judicialization

8. Oliver Windridge argues that the finding of exhaustion of local remedies by the African Court may be viewed “. . . as the African Court refusing to allow member states to simply create review processes under the guise of consultations in order to forestall potential applicants’ cases before the African Court.” Oliver Windridge, *A Watershed Moment for African Human Rights: Mtikila & Others v. Tanzania at the African Court on Human and Peoples’ Rights*, 15 AFR. HUM. RTS. L. J. 299, 303 (2015).

9. *Noudehouenou v. Benin*, App. No. 003/2020, Judgment, African Court on Human and Peoples’ Rights [AFR. CT. H.P.R.], ¶ 51 (Dec. 4, 2020), https://www.african-court.org/en/images/Cases/Judgment/003-2020-Houngue_Eric_Noudehouenou_v_Benin-_Judgment.pdf [<https://perma.cc/E4HF-9FHG>].

10. Hirschl argues that “[o]f the various institutional, societal, and political factors hospitable to the judicialization of politics, three stand out as being crucial: the existence of a constitutional framework that promotes the judicialization of politics; a relatively autonomous judiciary that is easily enticed to dive into deep political waters; and, above all, a political environment that is conducive toward judicialization of politics. Lawyers and rights-seeking groups often push toward ‘judicialization from below.’ Certain institutional features are more hospitable than others to the expansion of judicial power. The existence of an active, non-deferential constitutional court is a necessary (but not sufficient) condition for persistent judicial activism and the judicialization of mega-politics. However, the judicialization of mega-politics is first and foremost a political phenomenon.” Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK POLITICAL SCIENCE 253, 271 (Robert E. Goodin ed., 2009) [hereinafter *Judicialization of Politics*].

of mega-political electoral cases. These are the 2015 *Hope Democratic Party v. Nigeria* case and the 2015 *Congrès pour la Démocratie et le Progrès (CDP) & others v. The State of Burkina Faso* case before the ECOWAS Court. The other cases analyzed are the 2019 *Martha Karua v. Kenya* case before the East African Court of Justice, and the 2011 *Christopher Mtikila v. Tanzania* and 2020 *Hongue v. Benin* cases, both before the African Court. Part III discusses two examples of judicialization of mega-political electoral disputes in national courts. These are the 2020 *Mutharika v Chilima* case before the Malawian Supreme Court, and the 2017 *Odinga v. Kenyatta* case of the Kenyan Supreme Court. These two cases indicate that there are some instances where resort to an international court to intervene in national electoral processes is not necessary.

II

THE CONTOURS OF THE JUDICIALIZATION OF POLITICS

There is a dearth of scholarly investigation regarding the judicialization of politics in Africa—whether at the level of international or national courts.¹¹ Yet, a prevalent feature of post one-party African regimes is the trend towards judicialization of politics in general, and of elections in particular. As African countries have engaged in the rough and tumble of consolidating electoral democracy since the end of the cold war, contentious election disputes have increasingly been transferred into the legal arena. This has been mostly in the national legal arena, but also sometimes in the international legal arena.

Our mega-politics focus concerns the adjudication of domestic or national elections. By definition, elections tend to divide society into competing camps and partisan groups. In Africa, election disputes can also involve disputes about the fairness of the electoral process in addition to disputes about the tallying of votes. Taking into account the often-high octane politics surrounding closely contested presidential and gubernatorial elections in Africa, and the weakness of domestic courts in many African countries, international judges are likely to find themselves increasingly brought in as adjudicators of these fraught disputes.¹²

As Alter and Madsen explain in their Introduction, one of the goals of this special issue is to extend Ran Hirschl's insights about mega-politics to international adjudication. Alter and Madsen characterize Hirschl's conception of mega-

11. See generally, GATHII, *supra* note 5; Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL AND SOCIAL CHANGE 149 (James Thuo Gathii ed., 2021) [hereinafter *Towards an Analyses*].

12. See Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 2 (noting that “while ICs’ involvement in mega-political disputes is not new, it may be increasing”).

political adjudication as judicial involvement in “hotly-contested”¹³ issues and debates involving highly mobilized and divided partisans.¹⁴ According to them, “judicialized mega-politics applies whenever ICs are adjudicating legal issues that divide domestic societies or inter-state relations such that one would anticipate that, whatever the outcome, important and sizable social or political groups will end up greatly upset.”¹⁵ They agree with Hirschl that there has been an increasing “reliance on courts and judicial means [whether at the national, regional, or international levels] for addressing core moral predicaments, public policy questions, and political controversies.”¹⁶ The phenomenon “includes the wholesale transfer to the courts of some of the most pertinent and polemical political controversies a democratic polity can contemplate.”¹⁷ The judicial disputes that are the subject of this article are characterized by issues which go to the heart of nation building and collective identity. That is because the issues have arisen from electioneering processes that invariably leave sizable political and social constituencies unhappy. The cases are embedded in broader national sociopolitical contestations. The political attraction of adjudicating these mega-political disputes lies in the instrumental and non-material benefits that a high-profile litigation brings, and in some cases in the changes that adjudication prompts. These cases are instrumental in every phase, as they present the litigants with sustained leverage to pressure the government through the media.

The type of judicialization most relevant to our discussion involves circumstances where international courts and judges are relied upon for the resolution of “core political controversies that define (and often divide) whole polities.”¹⁸ Our study fits with the sub-categories that Hirschl identified, including:

[J]udicialization of electoral processes; judicial scrutiny of executive branch prerogatives in the realms of macroeconomic planning or national security matters (i.e., the demise of what is known in constitutional theory as the “political question” doctrine); fundamental restorative justice dilemmas; judicial corroboration of regime transformation; and, above all, the judicialization of formative collective identity, nation-building processes, and struggles over the very definition—or *raison d’être*—of the polity as such, arguably the most problematic type of judicialization from a constitutional theory standpoint.¹⁹

A critical feature of the judicialization of mega-politics is that they “expand the boundaries of national high-court involvement in the political sphere beyond

13. *Id.* at 1.

14. *Id.*

15. *Id.*

16. Ran Hirschl, *The New Constitution and the Judicialization of Pure Politics Worldwide*, 75:2 *FORD. L. REV.* 721, 721 (2006) [hereinafter *New Constitution*]; Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *ANN. REV. POL. SCI.* 93, 94 (2008) [hereinafter *Mega-Politics*].

17. *New Constitution*, *supra* note 16, at 722.

18. *Id.* at 727.

19. *Id.*

the ambit of constitutional rights or federalism jurisprudence, and take the judicialization of politics to a point that far exceeds any previous limit.”²⁰ In the African context, one area that this has manifested is in the expanding role of Africa’s international courts in the resolution of these types of disputes.²¹ The cases we analyze in the next part of this article shows the strategic ways that dissident influential politicians, opposition political parties, and non-governmental organizations have pushed the boundaries of Africa’s international courts. While Hirschl’s focus was on the national regimes, our article extends the analyses to Africa’s international courts. We are interested in the motivations for this extraterritorial journey in search of justice in what are otherwise national electoral issues.²² Hirschl refers to these motivations as “the determinants of judicialization.”²³ Some of the determinants of judicialization of mega-politics according to Hirschl include hegemonic preservation, competitiveness of a polity’s electoral market, and governing politicians’ time horizons.²⁴

The cases that have come before Africa’s international courts are largely based on the inability of national judicial courts to provide election losers opportunities to ensure elections are free and fair. Contrary to Hirschl’s argument that elites use courts for “hegemonic preservation,” in the cases we examine, it is dissident politicians and losing political parties that judicialize electoral disputes. We therefore agree with Alter and Madsen in their Introduction that judicialization of electoral disputes is not necessarily harmful to democracy or for that matter international courts, a claim we have pursued elsewhere at greater length.²⁵

Before proceeding to discuss our cases, we note the importance of context in understanding how mega-political cases are judicialized. It would be difficult to extrapolate experience from elsewhere to center our discussion of judicialization of mega-political disputes in Africa. As Hirschl argues:

Like any other political institution, constitutional courts do not operate in an institutional or ideological vacuum. Their explicitly political jurisprudence cannot be understood separately from the concrete social, political, and economic struggles that shape a given political system. Indeed, political deference to the judiciary, and the consequent

20. *Judicialization of Politics*, *supra* note 10, at 256.

21. *Towards an Analyses*, *supra* note 11, at 161.

22. Hirschl rightly notes that: “Judicialization of this type involves instances where courts decide on watershed political questions that face a nation, despite the fact that the constitution of that nation does not speak to the contested issues directly, and despite the obvious recognition of the very high political stakes for the nation.” *New Constitution*, *supra* note 16, at 727–28.

23. “Judicial empowerment may be driven by ‘hegemonic preservation’ attempts taken by influential sociopolitical groups fearful of losing their grip on political power. Such groups and their political representatives are more likely to delegate to the judiciary when they find strategic drawbacks in adhering to majoritarian decision-making processes or when their world-views and policy preferences are increasingly challenged in such arenas.” *Judicialization of Politics*, *supra* note 10, at 270.

24. *New Constitution*, *supra* note 16, at 745–46. “The transfer of foundational collective identity questions to the courts seldom yields judgments that run counter to the interests of those who chose to delegate more power to courts in the first place.” *Id.* at 747.

25. *See generally* GATHII, *supra* note 5.

judicialization of mega-politics, are integral parts and important manifestations of those struggles, and cannot be understood in isolation from them.²⁶

As we discuss the cases in the next part, we will provide the unique contexts within which each of these cases have arisen. In particular, it is important to note that these cases are recent because they were only possible from the late 1990s, when many countries were beginning to adopt multiparty politics in the third wave of democratization. Thus, even though in the mid-1990s, scholars seemed to have a consensus that constitutional courts with power to strike down laws enjoyed more public support than other political institutions—even when they exercised this power aggressively.²⁷ That was hardly the case in Africa. Now that there has been more judicialization of election disputes, it is hardly a moment like the 1990s of celebrating how constitutional courts have become involved in “articulating, framing, and settling fundamental moral controversies and highly contentious political questions.”²⁸ If anything, many scholars suggest this is a moment of de-judicialization and backlash against that 1990s celebratory embrace of an involved role for constitutional courts.

For our purposes though, we argue in favor of centering the experience from African countries in our analysis rather than simply applying a particular variation of the various theories of judicialization. After all, the judicialization of election disputes in Africa’s international courts is not driven by the same types of concerns such as compliance or changing or shifting the political equilibrium that seem to underlie theories of judicialization.

Notwithstanding the backlash against international courts, this article shows that Africa’s international courts have by and large continued to provide litigants a forum to advance their causes when questions of electoral injustice arise. These cases are therefore not about who won and who lost, whether there was compliance or not, or even about the role of these courts in regulating electoral competition. Rather, these cases provide litigants opportunities to raise awareness of electoral injustices and for establishing or reiterating principles for fair, free and competitive elections, as well as for exposing the corrupting influence of dominant political parties and incumbent politicians on national electoral processes.

III

JUDICIALIZATION OF MEGA-POLITICAL ELECTORAL DISPUTES IN AFRICA’S INTERNATIONAL COURTS

Multiparty elections in Africa have on occasion tended to exacerbate polarization, especially where preexisting cleavages like ethnicity, religious, regional,

26. *New Constitution*, *supra* note 16, at 744.

27. See generally C. NEAL TATE & TORBJORN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER: THE JUDICIALIZATION OF POLITICS* (1995).

28. Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 25 *CAN. J. L. & JURIS.* 191, 191 (2002).

or linguistic groups correlate with party support and voting behavior. Filing cases in international courts by non-dominant minority political parties and politicians serve important purposes. They expose the exclusionary electoral practices of dominant parties. They provide visibility for these non-dominant electoral competitors who have little visibility in the electoral process and are struggling to be seen. When these political actors file the cases before an election is held, like in the *Hope Democratic* and *CDP* cases discussed at length below, these cases become part and parcel of the larger efforts of these non-dominant political actors to pursue and seek fairness in electoral competition in their home countries. They hope that by calling attention to issues of electoral integrity, such as violations of campaign finance laws or exclusion of political candidates, these cases will keep alive the issues that these non-dominant actors care about in their home countries. Resorting to international courts increases the range of options that these non-dominant political actors can use to their advantage. International courts provide a forum that is not controlled by an incumbent government or political party that might be dominated by the majoritarian tendencies or preferences of the incumbents. Indeed, an international court provides a refuge outside national political systems that is not characterized by inclusive institutions that represent all regions, peoples and views that would alleviate conflict. Rather, domestic institutions are characterized by majoritarian preferences that tend to accentuate rather than moderate conflict or lead to accommodative outcomes for all groups. This is particularly so since most African electoral systems adopt a winner-take-all system in which dominant ethnic or regional candidates tend to attract absolute majorities of their ethnic or regional candidate. Such a system comes with an inbuilt tendency to permanently locking certain groups out of political power.²⁹ This is the prism through which electoral litigation in Africa's international courts must be seen—the extremely strong predisposition in Africa's electoral systems to exclude opposition political parties or candidates from non-dominant political parties or regions.

In the *CDP* case, the ECOWAS Court held that where a country's legislation makes it impossible for certain citizens to hold elective offices, such restriction of the right to elected office must nonetheless be justified by the commission of particularly serious offences. The ECOWAS court held that the exclusion from elected office at issue was neither legal nor necessary to stabilize the democratic order, contrary to Burkina Faso's assertions. Indeed, the restriction imposed by the Electoral Code had the sole effect of disqualifying applicants from standing as candidates. This in turn significantly limited the choice offered to the electorate and altered the competitive nature of the election. The table below summarizes the cases that we discuss in this article. The cases show that Africa's international courts overwhelmingly reject claims that they have no jurisdiction to

29. See, e.g., Yash Ghai, *Ethnicity and Autonomy: A Framework for Analysis*, in *AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES 1* (Yash Ghai ed., 2010) (discussing how ethnic conflicts can lead to many results, one important one being the “demand for and resistance to autonomy”).

entertain election related cases. Further, the table shows that Africa's international courts do issue provisional orders in cases involving claims of imminent treaty violations filed by parties prior to an election. Most importantly, in all these cases, the plaintiffs used the litigation process to publicize their grievances and galvanize their supporters, in addition to creating an opportunity for the government to have to answer for its conduct in a forum that it does not control. Since this article examines these cases from the perspective of the plaintiffs who bring them, the cases are described at some length. Only by doing so is it possible to really appreciate the value that litigants see in bringing their election disputes to these courts.

Table 1: Overview of the Adjudication of African Election Disputes

Case	Treaty Complaint	Pre-Election Orders Sought	Post-Election Orders Sought	Government Objection	Final Orders	Post-Judgment Mobilizing
Hope Democratic (ECOWAS Court)	Right to participate in elections freely and equally on a level playing field	Provisional orders to prevent imminent treaty violation	NA	No jurisdiction; No Exhaustion; No violation	Although ECOWAS Court has jurisdiction, all claims dismissed	Yes
CDP (ECOWAS Court)	Right to participate in elections freely and equally on a level playing field	Provisional orders to prevent imminent treaty violation	NA	No jurisdiction & admissibility; No Exhaustion; Harm hypothetical	Court had jurisdiction because of alleged treaty violations and ordered reinstatement of excluded candidates	Yes
Karua (East African Court of Justice)	Failure to uphold good governance, democracy, human rights and rule of law	NA	Declaratory order	No jurisdiction; Exhaustion; No Violation	Kenya failed to uphold plaintiff's rights. Awarded damages.	Yes
Mtikila (African Court)	Right to free association, to participate freely in	NA	Repeal ban on independent candidates	No jurisdiction; No Violation	Prevailed	Yes

	government and equality					
Hongue (ECOWAS Court)	Freedom of association & expression and to be free from discrimination	Stay of national law that excluded opposition from elections	Finding of Violation	No jurisdiction; No Violation	Twice the ECOWAS Court issued provisional orders preventing Benin from excluding plaintiffs in elections	Yes
Mutharika (Malawi, Supreme Court)	Massive electoral irregularities & fraud	NA	Reverse election	NA	Presidential election reversed	Yes
Raila (Kenya, Supreme Court)	Massive electoral irregularities & fraud	NA	Reverse election	NA	Presidential election reversed	Yes

A. Hope Democratic Party & Alhaji Haruna Yahaya Shaba v. Federal Republic of Nigeria (FRN) & Five Others

The *Hope Democratic Party* case brought before the ECOWAS Community Court of Justice demonstrates the benefits—beyond seeking victory or invalidating an election—that litigants derive from judicializing their disputes in international courts. This case was initiated before a presidential election, and the litigants, an opposition political party, claimed that there was an imminent treaty violation. We begin by providing the factual backdrop of the case.

The People’s Democratic Party, (“PDP”—the fourth defendant) governed Nigeria for fourteen years until it was defeated in 2015 by the All Progressives Congress, (“APC”), in what may be described as the most consequential election in Nigeria’s turbulent political history.³⁰ The plaintiff—Hope Democratic Party—was one of the other thirteen opposition political parties that fielded presidential candidates in the 2015 Nigerian presidential election. It was not one of the main contenders. As such, the institution of this dispute by a non-dominant opposition

30. “For the first time since the inception of Nigeria’s fourth republic, Nigerians had a choice. But more than that, their choices expressed in their electoral votes actually mattered. In this election, Nigerians and the world were able to see genuine electoral accountability and transparency at play in the country’s political process.” Udoka Okafor, *Analysis of the Electoral Data in Nigeria’s 2015 Presidential Elections*, HUFFPOST (June 14, 2015), https://www.huffpost.com/entry/analysis-of-the-electoral-data-in-nigerias-2015-presidential-elections_b_7038154 [<https://perma.cc/PWG2-UCZ9>].

political party indicates that its goal was not necessarily to overturn the election results. Instead, perhaps thinking ahead of future elections, its goal was to level the electoral playing field.

It hoped to do so by challenging violations of election campaign finance limits.³¹ Hope Democratic Party alleged that in the 2015 presidential election, although PDP's candidate was limited to raising N1 billion (approximately \$28 million USD) in campaign funds, the candidate raised over N20 billion (approximately \$55 million USD).³² Hope Democratic Party argued that the excess funds raised were in violation of the Nigerian Electoral Act 2010 (as amended) as well as Section 38(2) of the 2004 Nigerian Companies and Allied Matters Act.³³ Hope Democratic Party also argued that its rights to participate freely and equally on a level playing field in government as guaranteed by the Nigerian Constitution and the African Charter on Human and Peoples' Rights were violated.³⁴ Hope Democratic Party also sought damages in the sum of \$300

31. See *Hope Democratic Party v. Nigeria*, No. ECW/CCJ/APP/04/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶¶ 3.1, 6.1.5 (Feb. 27, 2019) (holding that president-elect of Nigeria violated presidential campaign finance laws and committed acts of political intimidation and corruption); see also Chikodiri Nwangwu & Olihe Aadaeze Ononogbu, *Electoral Laws and Monitoring of Campaign Financing During the 2015 Presidential Election in Nigeria*, 17 JAPANESE J. POL. SCI. 614, 614–34 (2016) (discussing how electoral laws relate to campaign finance monitoring by analyzing the 2015 presidential election in Nigeria); Clifford Ndujihe, Henry Umoru, Dapo Akinrefon & Levinus Nwabughio, *PDP Presidential Fund-Raising: Presidency, APC Bicker over N21BN*, VANGUARD (Dec. 22, 2014), <https://www.vanguardngr.com/2014/12/pdp-presidential-fund-raising-presidency-apc-bicker-n21bn/> [<https://perma.cc/J99R-VKCU>] (detailing Nigerian political controversy surrounding fundraising dinner that generated more than twenty-one billion naira in presidential campaign contributions); Olalekan Adetayo, *Govs, Businessmen, Others Donate N21.27BN to Jonathan*, SAHARA REPS. (Dec. 21, 2014), <http://saharareporters.com/2014/12/21/govs-businessmen-others-donate-n2127bn-jonathan> [<https://perma.cc/JMK9-R69L>] (recounting events and donors at Nigerian President Goodluck Jonathan's campaign fundraiser).

32. The excessive amount of re-election campaign funds raised by the incumbent was also the subject of various local news media reports. See, e.g., Ben Agande, *Naira Rain at Jonathan's Re-Election Fund Raiser*, VANGUARD (Dec. 21, 2014), <https://www.vanguardngr.com/2014/12/naira-rain-jonathans-re-election-fund-raiser/> [<https://perma.cc/5V36-2BTJ>]; Olalekan Adetayo, *Govs, Businessmen, Others Donate N21.27BN to Jonathan*, SAHARA REPS. (Dec. 21, 2014), <http://saharareporters.com/2014/12/21/govs-businessmen-others-donate-n2127bn-jonathan> [<https://perma.cc/JMK9-R69L>] (describing a major boost to President Goodluck's campaign for reelection).

33. Companies and Allied Matters Act (2004), § 43(2) (Nigeria) ("CAMA") provides that: "A company shall not have or exercise power either directly or indirectly to make a donation or gift of any of its property or funds to a political party or political association, or for any political purpose, and if any company, in breach of this subsection makes any donation or gift of its property to a political party or political association, or for any political purpose, the officers in default and any member who voted for the breach shall be jointly and severally liable to refund to the company the sum or value of the donation or gift and in addition, every such officer or member commits an offence and is liable to a fine equal to the amount or value of the donation or gift." 2004 CAMA was repealed for 2020 CAMA but this language remains in Section 38(2) of the 2020 Act. See Yusuf Alli, Adebisi Onanuga & Bisi Oladele, *N21b Donation Raises Legal Issues for PDP, Jonathan*, THE NATION (Dec. 24, 2014), <http://thenationonlineng.net/n21b-donation-raises-legal-issues-pdp-jonathan/> [<https://perma.cc/EY39-3BB7>] (examining legal implications of President Goodluck Jonathan's fundraising campaign).

34. *Hope Democratic Party v. Nigeria*, No. ECW/CCJ/APP/19/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 6.1.3 (Oct. 14, 2015); ADEBOWALE OLORUNMOLA, COST OF POLITICS IN NIGERIA: BACKGROUND PAPER 1 (Westminster Foundation for Democracy ed., 2017), <https://www.wfd.org/wp-content/uploads/2017/09/Cost-of-Politics-Nigeria.pdf>

million USD and an order to confiscate the illegal campaign fund raised by the defendants.³⁵

On their part, the defendants denied any wrongdoing that limited the freedom of the plaintiffs to participate in the presidential election or indeed any violation of the laws of the Federal Republic of Nigeria. They argued that the Court should decline jurisdiction to entertain the matter as none of the claims submitted by the plaintiffs came under Article 9 of the Supplementary Protocol of the Court.³⁶ In addition, they argued that the plaintiff had failed to exhaust local remedies available under Articles 50 and 56(5) of the African Charter on Human and Peoples' Rights.³⁷

The ECOWAS Community Court narrowed the issues to three questions.³⁸ First, did the court have *in personam* jurisdiction over *all* the defendants? Answering in the negative, it noted that, while the Court had jurisdiction over Nigeria as an ECOWAS Member State and a proper party against whom a claim for the violation of human rights can be instituted, it did not have jurisdiction over individual defendants, including President Jonathan Goodluck.³⁹ Since the Court did not find that the first defendant had committed any wrongdoing, it dismissed the action against Nigeria as being “frivolous, speculative and uncertain, and vague and indistinct.”⁴⁰ Regarding whether the second plaintiff's (Alhaji Haruna Yahaya Shaba) human rights were violated by Nigeria, the Court found that in the negative and noted “that it will not interfere with matters of enforcement of domestic laws of member states.”⁴¹

[<https://perma.cc/4B8H-GWQP>] (explaining that “[i]n Nigeria, the 1999 constitution (as amended) of the Federal Republic of Nigeria specified in section 225 (1-6) conditions and scrutiny of the sources of funds and expenses of political parties. Section 225 (3)(a) and (b) as well as 225 (4) forbid political parties from foreign funding of any kind. Section 226 (1-3) demands annual reports of account from political parties. By extension, the Electoral Act (2010) stipulates the ceiling of expenses by candidates and political parties for specific elective positions. The maximum limits are pegged at: N1,000,000,000 (naira) for presidential candidates, N200,000,000 for governorship candidates, and N40,000,000 and N20,000,000 respectively for Senate and House of Representatives candidates.”).

35. In particular, they argued that the actions of the Defendants have subjected the Plaintiffs and their supporters to “unimaginable political intimidation/exclusion, psychological trauma[,] victimization and humiliation which affected their participation at the . . . presidential elections, and right to compete in getting their candidates freely elected at that presidential election on equal and level playing grounds.” *Hope Democratic Party v. Nigeria*, ECW/CCJ/APP/19/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶¶ 3.6–3.7 (Oct. 14, 2015).

36. *Id.* ¶ 6.3.2.

37. *Id.* ¶ 6.4.10.

38. *Id.* ¶¶ 7.1–7.3.

39. *Id.* ¶¶ 8.1.4–8.1.24. While the Court could exercise jurisdiction over Nigeria as a Member State of the ECOWAS Community and signatory to the ECOWAS Treaty and other Community Instrument including the Protocol on Democracy and Good Governance and a proper Applicant, the Court declined jurisdiction in respect of the second to sixth defendants for reasons that include: not being amenable to the jurisdiction of the Community Court of Justice and in particular lack of jurisdiction over individuals.

40. *Hope Democratic Party v. Federal Republic of Nigeria*, ECW/CCJ/APP/19/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 8.1.8 (Oct. 14, 2015).

41. *Id.* ¶ 8.1.27.

Since the action was commenced before the conduct of the national election, the ruling of the Court was overtaken by events in Nigeria. The primary defendants in the case, President Goodluck Jonathan and his party, PDP, lost the election. The ECOWAS Community Court judges therefore posed an interesting question to the counsel for the plaintiffs. Would they be open to withdrawing the suit? Refusing to withdraw the suit, Hope Democratic Party Counsel argued that their client “wanted [the Community Court] to rule on the issue so as to serve as a deterrent to other would-be violators of the elections law on fairness and equality before the law.”⁴²

This response indicates to us that motivation for Hope Democratic Party, a non-dominant political party, was not aimed at reversing their electoral losses. Rather, what this case shows is that non-dominant political parties file cases in international courts to pursue objectives such as publicizing the right of minority parties and candidates to compete and participate in national elections on an equal basis with dominant political parties.⁴³ Further, in this case, Hope Democratic Party sought to continue the case notwithstanding the fact that it was overtaken by events. They did so to expose the illegal conduct of a dominant political party and its presidential candidate who had received anonymous donations in amounts in excess of those allowed by the law.

Hope Democratic Party well understood in filing the case not only against Nigeria but also against a dominant political party and its presidential candidate—at the time a sitting head of state—that the ECOWAS Court did not have jurisdiction over individual or corporate defendants. Yet, because the opportunity to have these defendants appear before the ECOWAS Court gave them an opening to call public attention to issues of electoral integrity, they nevertheless filed the case. By suing the sitting head of state and his political party, Hope Democratic Party forced the head of state and his political party to appear before the court to seek the case to be dismissed. In doing so, Hope Democratic Party wanted the case to stay alive because through it, there would be continued attention to how incumbent political parties had superior access to state resources and campaign funds, and how this access thwarts opposition challengers. Therefore, the *Hope Democratic Party* case could be understood as part of the larger effort of non-dominant political parties and politicians to level the electoral playing field in future elections.

The role of the ECOWAS Community Court is an important focus of this case. Although it recognized that it did not have jurisdiction to decide election issues that fall within the domestic jurisdiction of Nigeria, it did not summarily dismiss the case. A summary dismissal on jurisdictional grounds would have been warranted because the Court does not have jurisdiction over individuals and po-

42. *Id.* ¶ 9.1.

43. See *Towards an Analyses*, *supra* note 11, at 176–77; James Thuo Gathii, *Introduction*, in *THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL AND SOCIAL CHANGE* 9 (James Thuo Gathii ed., 2020).

litical parties. Instead, the Court preserved those parts of the case that raised international legal issues for determination even though there were political issues that clearly fell outside its jurisdiction. This accords with the practice of the International Court of Justice.⁴⁴

The fact that the ECOWAS Court kept the parts of the case alive that raised international legal issues for determination in turn reinforced Hope Democratic Party's goal of exposing and publicizing electoral injustices. In doing so, litigants like Hope Democratic Party also aim to use litigation in international courts to galvanize their supporters and to mount pressure on their national governments and incumbent parties to level the playing field in future elections so that non-dominant political parties and politicians can participate equally in the electoral process.

B. *Congrès pour la Démocratie et le Progrès & Others v. The State of Burkina Faso*

Like the *Hope Democratic Party* case, the *CDP* case from Burkina Faso, also before the ECOWAS Community Court of Justice, was a mega-political election dispute judicialized before an election. We discuss the *CDP* case because, like the *Hope Democratic Party* case, it demonstrates how non-dominant political parties use cases in international courts to expose electoral repression by dominant political parties. The *CDP* case pitted supporters of a powerful former President against those opposed to him. It also had powerful regional and international dimensions because of the involvement of ECOWAS in trying to resolve the chaos that followed the ouster of Blaise Compaoré as president. In addition, Compaoré had become a reliable Western ally in the war against terrorism in the Sahel region.⁴⁵

In 2014, Burkina Faso's President Blaise Compaoré and his political party, Congrès pour la Démocratie et le Progrès (CDP), were ousted from power following popular mobilization against Campaore's attempt to amend the Constitution's Presidential term limit.⁴⁶ He had been in power since 1987. The dispute was triggered by an amendment to the electoral laws of Burkina Faso that ousted the plaintiffs, a group of opposition political parties and thirteen individuals, from

44. See generally Andrew Coleman, *The International Court of Justice and Highly Political Matters*, 4 MELB. J. INT'L L. 29 (2003); Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81 (1999); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980, I.C.J. 3 (May 24); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1979 I.C.J. 7 (Dec. 15).

45. REUTERS, *The Downfall of Burkina Faso's President*, NEWSWEEK (Nov. 2, 2012, 9:20 AM), <https://www.newsweek.com/downfall-burkina-fasos-president-281587> [<https://perma.cc/CYL9-QTRX>].

46. See Daniel Eizenga, *Burkina Faso*, in 12 AFRICA YEARBOOK: POLITICS, ECONOMY AND SOCIETY SOUTH OF THE SAHARA IN 2015 53–54 (Jon Abbink et al. eds., 2016); Eloïse Bertrand, *Mobilization, Negotiation, and Transition in Burkina Faso*, 491 U.S. INST. PEACE 1, 11–15 (2021), https://www.usip.org/sites/default/files/2021-03/sr_491-mobilization_negotiation_and_transition_in_burkina_faso.pdf [<https://perma.cc/ZAU7-D9NY>].

participation in future elections.⁴⁷ The principal question before the ECOWAS Community Court was whether the amendment of Burkina Faso's electoral law violated the right of certain political parties and citizens to participate and vote in elections.⁴⁸

The plaintiffs argued that the amendments violated their right to participate freely in elections in Burkina Faso and several international legal instruments to which Burkina Faso is a signatory.⁴⁹ Burkina Faso built its case on three grounds: the ECOWAS Court is incompetent to entertain the action, the Applicants' motion was inadmissible, and that its motion was ill-founded.⁵⁰

On the first question relating to lack of jurisdiction, Burkina Faso argued that the ECOWAS Court was not seized of jurisdiction because the Applicants' action was premised only on a possible, hypothetical, or potential violation of human rights as opposed to one that was concrete, actual, or substantive. Citing prior case law, the ECOWAS Court⁵¹ noted that it can legitimately adjudicate over imminent violations that could come to fruition very soon.⁵² In rejecting this argument, the court concluded that "if it had to wait for the exhaustion of the effects of any transgression before stating the law, its jurisdiction in a context of urgency would have no sense, because the electoral rights of the presumed victims for participating in the electoral race would inexorably be breached."⁵³

Further, the court emphasized its previous position that in special circumstances, "the risk of a future violation confers on an applicant the status of victim"

47. *Congrès pour la Démocratie et le Progrès (CDP) v. Burkina Faso*, ECW/CCJ/APP/16/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 4 (July 13, 2015) (the amendment made "all persons who had supported anti-constitutional change, in violation of the principle of democratic change, notably in violation of the principle of limitation of the number of terms of political presidential power, leading up to an uprising or any other form of upheaval.").

48. In this context, on April 7, 2015, the Council adopted Law No. 005-2015 that amended Law No. 014-2001/AN of July 3, 2001 on the electoral code. In respect of ineligible persons, that is, those unable to stand for election, a new Section 135 added, in addition to the following provisions: individuals deprived by judicial decision of their eligibility rights under the laws in force, persons with legal advisers, and individuals sentenced for electoral fraud. *Id.* ¶¶ 4, 22. See also *Burkina Faso Appoints Transitional Government*, AL JAZEERA (Nov. 24, 2014), <http://www.aljazeera.com/news/africa/2014/11/burkina-faso-appoints-transitional-government-20141123225514740864.html> [<https://perma.cc/7Q2P-TXXT>] (discussing that Burkina Faso appointed a 26-member transitional cabinet to lead the country until the next election).

49. They relied on the following international and regional instruments: Article 2, paragraph 1 and Article 21, paragraphs 1 and 2 of the 1948 Universal Declaration of Human Rights; Article 26 of the 1966 International Covenant on Civil and Political Rights; Articles 2 and 13, paragraphs 1 and 2, of the African Charter on Human and Peoples' Rights; Article 3 paragraphs 7 and 11, Article 4 paragraph 2, Article 8 paragraph 1, and Article 10 paragraph 3 of the African Charter on Democracy, Elections and Governance; and Article 1(i) of the ECOWAS Protocol on Democracy and Good Governance, 2001. *Congrès pour la Démocratie et le Progrès (CDP) v. Burkina Faso*, ECW/CCJ/APP/16/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 8 (July 13, 2015).

50. *Id.* ¶ 9.

51. See generally *Ministère Public v. Hissein Habré*, Extraordinary African Chambers in Senegal, Judgment (May 30, 2016).

52. *Congrès pour la Démocratie et le Progrès (CDP) v. Burkina Faso*, ECW/CCJ/APP/16/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 16 (July 13, 2015).

53. *Id.* at ¶ 16.

and in such situations, there are “reasonable and convincing indications of the probability of the occurrence of certain actions” that might violate human rights.⁵⁴ Having found that the Applicants’ complaints fell in this category, the court dismissed Burkina Faso’s argument that the court lacked competence to rule on the matter. The ECOWAS Court reiterated the *Ugokwe Doctrine*⁵⁵ noting that, although it may lack the jurisdiction to adjudicate over electoral disputes in Member States, “it could legitimately entertain cases where it appears to the Court that the electoral process was vitiated by human rights violations.”⁵⁶ This illustrates a core thesis of this article, that litigants judicialize mega-political disputes before an election to publicize the imminent violation of international law. In other words, the judicialization of mega-political cases arises where such cases are bound up with violations of human rights protected under ECOWAS treaties.

Therefore, the ECOWAS Court rejected Burkina Faso’s argument that the case was inadmissible. Although the Court’s jurisdiction extends only over individuals and not political parties—especially where the question of the right to participate in elections and in the management of public affairs are concerned—the ECOWAS Court held that there is nothing that inherently prevents it from hearing cases about this. This is particularly so as the restriction may have the unintended consequence of harming political formation and participation in the management of public affairs.⁵⁷

The third and final issue was whether the amendment of Burkina Faso’s electoral law and its application violated the right to certain political parties and citizens to vote and participate in elections. Reviewing some of its own jurisprudence and governing laws, the ECOWAS Court held that any reference to national law, “be it the Constitution of Burkina Faso, or any norms whatsoever related to the Constitution of Burkina Faso,” must be removed from judicial debate.⁵⁸ Hence, references by the applicant to the National Constitution and the Transition Charter of Burkina Faso were found to be inappropriately before the ECOWAS Community Court. Being an “international court, its mandate is restricted to sanctioning [Member] States’ disregard for the obligations arising from the international texts binding on them.”⁵⁹ Further, given the ambiguity of the new Article 135 of the Electoral Code of Burkina Faso, the court argued that it must resist any temptation to clarify or engage in the exegesis of the text or to orient its interpretation

54. *Id.* at ¶ 17; *see also* Koraou v. Niger, ECW/CCJ/APP/08/08, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 49 (Oct. 27, 2008).

55. *See Towards an Analyses, supra* note 11, at 149 (detailing the creation of the Ugokwe Doctrine).

56. *Congrès pour la Démocratie et le Progrès (CDP) v. Burkina Faso*, ECW/CCJ/APP/16/15, Judgment, The Court of Justice of the Economic Community of West African States [ECOWAS], ¶ 19 (July 13, 2015).

57. *Id.* ¶ 20 (“Not only that the texts governing the Court do not exclude legal entities from bringing cases before the court – on condition that they come before the Court as victims (Article 10 (d) of the 2005 Protocol on the Court), but it would be purely artificial and unreasonable for the Court to deny political parties the right to bring their cases before it, once the rights relating to their assigned mission of participating in the electoral race are violated.”).

58. *Id.* ¶ 25.

59. *Id.*

in any particular way.⁶⁰

According to the court, there was no doubt that the exclusion of a number of political groups and citizens from electoral competition constituted discrimination which is difficult to justify. Therefore, the court held that when a country's legislation makes it impossible for certain citizens to hold elective offices, such restriction of the right of access to public office must nonetheless be justified by the commission of particularly serious offences. The ECOWAS court held that the exclusion at issue was neither legal nor necessary to stabilize the democratic order, contrary to Burkina Faso's assertions. Indeed, the restriction imposed by the Electoral Code had the sole effect of preventing applicants from standing as candidates. This in turn significantly limited the choice offered to the electorate and altered the competitive nature of the election. In its final analysis, the ECOWAS Court held that the political groups and Burkinabe citizens who could stand for election because of the amendment of the electoral law had to be reinstated.

Ultimately, although the Transitional Council allowed only a few of those excluded from the election from participating in the elections, it largely ignored the ruling of the ECOWAS Court of Justice.⁶¹ The Transitional Council was criticized for violating the rights of those who had been left out of the electoral process. Those left out, especially in CDP, argued that the electoral process and its outcome were illegitimate. The highly mobilized civil society groups and political parties in Burkina Faso got not only the ECOWAS Court of Justice involved in seeking a resolution of the political impasse in their country, but the ECOWAS Community institutions and mechanisms in the peace building process as well.⁶² Even though there was no compliance, the ECOWAS Community Court of Justice did establish an important precedent, according to which litigants whose rights are in peril had standing to seek judicial orders to prevent the violation of their rights. The kind of emergency judicial relief that was procured in this case in turn laid the foundation for the continued lobbying by the excluded candidates and their political party seeking to be included within the very fraught electoral process.⁶³ Ultimately, when the elections in Burkina Faso were held that December, they were overwhelmingly endorsed as having been free and fair—the result

60. *Id.* ¶¶ 26–27 (“[I]ts function is not to discover the intention of the national legislator, or to compete with national courts in their own field, which is precisely that of interpreting national texts. However, the Court regains jurisdiction once the interpretation or application of a national text has the object or effect of depriving citizens of rights derived from international instruments to which Burkina Faso is a party.”).

61. Mathieu Bonkougou, *Burkina Dismisses Election Candidates Linked to Ex-President*, REUTERS, (Aug. 30, 2015, 3:35 AM), <https://www.reuters.com/article/ozatp-uk-burkina-election-idAFKCN0QZ07L20150830> [<https://perma.cc/V4BN-8F5U>].

62. See generally Abdoul Karim Saidou, ‘We Have Chased Blaise, So Nobody Can Resist Us’: *Civil Society and the Politics of ECOWAS Intervention in Burkina Faso*, 25:1 S. AFR. J. INT’L AFF. 39 (2018).

63. See Antonia Witt & Simone Schnabel, *Taking Intervention Politics Seriously: Media Debates and the Contestation of African Regional Interventions ‘from Below’*, 14 J. INTERVENTION AND STATEBUILDING 276 (2020) (noting that in “Burkinabe media the decision became a political issue and divided public debate between supporters and opponents of the transitional government.”).

of unprecedented unity among civil society groups and opposition political parties with the regional support from ECOWAS, as well as from Burkina Faso's donors abroad.⁶⁴

C. *Martha Karua v. Attorney General of Kenya in the East African Court of Justice*

Unlike the preceding mega-political disputes, *Martha Karua's* case in the East African Court of Justice is an example of judicialization after an election has been conducted. As alluded to above, this and similar cases are brought for a number of reasons including for publicity purposes; rallying supporters to continue the fight against a repressive executive; and at other times to embarrass governments.

Martha Karua, one of Kenya's foremost opposition politicians—also referred to as the iron-lady of Kenyan politics—lost a gubernatorial election in Kenya's 2017 General Elections. She filed a case in the East African Court of Justice after losing her election petition before the High Court, Court of Appeal, and the Supreme Court of Kenya.⁶⁵ In her petition before the East African Court of Justice, Ms. Karua argued her case was necessitated by a “monumental failure” by the Kenyan judiciary which constituted a violation of Kenya's commitments under the East African Community Treaty “to uphold good governance, democracy, the rule of law, human and people's rights.”⁶⁶ To allow the East African Court of Justice to adjudicate over the dispute, she shoehorned her election complaint to the cause of action established by the East African Court of Justice in the 2007 Katabazi case.⁶⁷ Under that cause of action, allegations of human rights violations are construed to come within the court's jurisdiction to interpret East African Community Treaties, even though the court has no explicit jurisdiction to decide human rights cases.

What is striking about this case is that it had been declared to be “hopeless, defective and incurable” by the Kenyan High Court.⁶⁸ The Kenyan press referred

64. Eloise Bertrand, *How Burkina Faso Ensured its Freest and Fairest Elections Ever*, AFR. ARGUMENTS (Dec. 2, 2015), <https://africanarguments.org/2015/12/how-burkina-faso-ensured-its-freest-and-fairest-ever-elections/> [https://perma.cc/L67R-GUY9].

65. For an early review of the prospects of the case, see Wilfred Mutubwa, *Martha Karua v. Republic of Kenya: A Litmus Test for East African Court of Justice's Ever Shifting Supremacy and Jurisdictional Remit*, AFRONOMICSLAW (Nov. 8, 2019), <https://www.afronomicslaw.org/2019/11/08/martha-karua-v-republic-of-kenya-a-litmus-test-for-east-african-court-of-justices-ever-shifting-supremacy-and-jurisdictional-remit/> [https://perma.cc/Q24X-GFBD]. For a later early analysis when the EACJ decided the case, see Harrison Mbori, *EACJ First Instance Court Decides Martha Karua v. Republic of Kenya: The Litmus Test for EACJ Jurisdiction and Supremacy*, AFRONOMICSLAW (Nov. 30, 2020), <https://www.afronomicslaw.org/index.php/2020/11/30/eacj-first-instance-court-decides-martha-karua-v-republic-of-kenya-the-litmus-test-for-eacj-jurisdiction-and-supremacy> [https://perma.cc/N7EC-JCH3].

66. Luke Anami, *Kenyan Governor Asks to be Part of Case at EACJ*, THE E. AFR. (Jan. 25, 2020), <https://www.theeastafrican.co.ke/news/ea/Kenyan-governor-asks-to-be-part-of-case-at-EACJ/4552908-5431160-k1hx1y/index.html> [https://perma.cc/PJ9Y-NUEQ].

67. Katabazi v. Sec'y Gen. of the E. Afr. Cmty., Ref. No. 1 of 2007 (Nov. 1, 2007), https://www.eacj.org/wp-content/uploads/2012/11/NO_1_OF_2007.pdf [https://perma.cc/Q8LL-34G3].

68. Walter Menya, *Karua Relentless in Bid to Discredit Anne Waiguru Poll Win*, NATION (Oct. 5, 2019), <https://nation.africa/kenya/news/politics/karua-relentless-in-bid-to-discredit-anne-waiguru-poll-win-210568?view=htmlamp> [https://perma.cc/Q9MZ-7X66].

to the filing of the case in the East African Court of Justice as part of Ms. Karua's relentless efforts to expose her allegation that her electoral loss was the consequence of the fact that her political rival had engaged in electoral misconduct. Her political rival rode to victory on a ticket sponsored by the ruling party.⁶⁹ Ms. Karua filed her case after the Supreme Court of Kenya invalidated President Uhuru's 2017 election in an unprecedented decision.⁷⁰ The theory of *Ms. Karua's* case was in part that, because the Supreme Court of Kenya had found that the Presidential election had been characterized by irregularities and was therefore invalid, all other down the ballot elections were tainted with these irregularities and should therefore have been similarly invalidated.⁷¹

Ms. Karua's efforts to judicialize her electoral loss before the East African Court of Justice must be examined in the larger context within which it arose. This case reflected the huge political divides within Kenya's ruling class. Martha Karua had lost the 2017 gubernatorial election to a political newcomer with very close connections to President Uhuru Kenyatta. Her electoral loss was widely regarded as a repudiation of her storied political career. To further indicate the political salience of the case, a short historical but relevant detour is necessary. About ten short years before her 2017 case, Martha Karua was then a powerful Minister of Justice and Constitutional Affairs. In that role, she led the backlash against the East African Court of Justice behind the scenes following the landmark EACJ 2006 *Nyong'o* decision.⁷² Quite notably, the *Nyong'o* decision was another electoral dispute also involving an acrimonious intra-ruling party split between a faction allied to the then president and another faction that was increasingly withdrawing its support to the then president. The question before the EACJ was whether a slate of members to the East African Legislative Assembly that had been put forward by the then president's faction had been elected consistently with the requirements of the Treaty for the Establishment of the East African Community. In the unprecedented decision, the EACJ imposed an injunction preventing the swearing in of that slate. Angered by this decision since it challenged a slate of candidates supported by a president under whom she

69. *Id.*

70. See *Odinga v. Indep. Electoral & Boundaries Comm'n [IEBC]* (2017) S.C.K. (Kenya), <http://kenyalaw.org/caselaw/cases/view/140716/> [<https://perma.cc/BYH9-SSTT>] (holding for the invalidation the 2007 election of President Uhuru); see also O'Brien Kaaba, *Raila Amolo Odinga and Another v. Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017*, 1 SAIPAR CASE REVIEW 8, 8 (2018) (explaining the significance of Presidential Petition No. 1 of 2017); Olabisi D. Akinkugbe & James T. Gathii, *Judicial Nullification of Presidential Elections in Africa: Peter Mutharika v. Lazarus Chakera and Saulos Chilima in Context*, AFRONOMICSLAW (Jul. 3, 2020), <https://www.afronomicslaw.org/2020/07/03/judicial-nullification-of-presidential-elections-in-africa-peter-mutharika-v-lazarus-chakera-and-saulos-chilima-in-context> [<https://perma.cc/ETC9-K46T>] (discussing the implications of "the judicialization of a high-profile election dispute").

71. George Munene, *Karua Wants 3-Judge Bench to Hear Petition Against Waiguru*, NATION (Sep. 11, 2017), <https://www.nation.co.ke/counties/Kirinyaga/Martha-Karua-election-petition/3444752-4091532-kl6itz/index.html> [<https://perma.cc/M2JB-HKX7>].

72. Luke Anami, *Regional Court Orders Kenya to Pay Martha Karua \$25,000 Over Poll Petition*, E. AFR. (Nov. 30, 2020), <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-martha-karua-election-petition-3214308> [<https://perma.cc/TX27-KXRB>].

served, Martha Karua led a partially successful backlash against the EACJ that, among other things, resulted in the creation of an Appellate Division.⁷³

Ms. Karua's 2019 petition to the East African Court of Justice can therefore be regarded as moment two. After her political fortunes changed, she came to regard the East African Court of Justice as an important possibility to keep her dissatisfaction with the 2017 electoral result in the public limelight. What does this example tell us about the utility of an international court venue to judicialize political disputes, particularly by a politician who had previously supported limiting the jurisdictional limits of that court, and even gone further by seeking to discipline its judges for ruling against the government in which she served? At minimum this example shows how politicians engaged in domestic political disputes, rather than judges, are often the driving force in judicializing mega-political disputes as the framing article argues. The two moments examined in this example show how the same politician can play inconsistent roles in different time periods— in period one seeking to limit what they perceive to be judicial outreach of an international court, but in period two, when they are out of political power, seeking to use an international court to advance their political cause having run out of options at the national level. This is consistent with how judicialization in international courts is more likely to occur as argued in the framing article, and consistent with Hirschl's argument that judicialization by powerful elites is more likely because it was politically expedient to do so.⁷⁴

Another key aspect of this case is that Martha Karua prevailed in the EACJ.⁷⁵ The EACJ's First Instance Division agreed with Martha Karua that by summarily dismissing her electoral complaint because it was filed out of time, Kenyan courts acted inconsistent with her treaty rights under EAC law. In particular, the First Instance Division found it "extremely troublesome" that the Supreme Court of Kenya's decision held that, since it was impossible for her to comply with the time frame within which she could appeal, the Kenyan Court of Appeals Court should therefore have "terminated the matter" because it was "well aware that any substantive determination of the petition by the High Court would be an exercise in futility."⁷⁶ This finding that Karua's quest to enforce her right of access to justice was characterized as an "exercise in futility" became the legal anchor for a finding of the violation of the right of access to justice. The First Instance Division noted

73. The Nyong'o case set in motion a series of important cases on elections to the East African Legislative Assembly. For a full analysis of those cases, see James Thuo Gathii, *International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL AND SOCIAL CHANGE 43, 43–87 (James Thuo Gathii ed., 2021). For a discussion of the backlash this created, see Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 293–328 (2016).

74. See *Mega-Politics*, *supra* note 16, at 108.

75. *Karua v. Kenya*, ref. no. 20/2019, East African Court of Human Rights, ¶ 70 (Nov. 30, 2020), <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/12/JUDGMENT4.pdf> [<https://perma.cc/R69R-3NWN>].

76. *Id.* ¶ 55.

that, although the Kenyan Constitution provided a solution “to the unjust circumstances” that Karua found herself in,⁷⁷ the Supreme Court of Kenya curtailed Karua’s right to access to justice.⁷⁸ As a remedy, the First Instance Division awarded Karua \$25,000 USD “given the lost opportunity to be heard in an election petition that could have resulted in national gubernatorial service.”⁷⁹

One commentator noted that the importance of the judgment did not lie in whether or not the gubernatorial election had been fair or unfair, rather the case “underscored the importance of electoral justice in regard to the rule of law principle in the treaty.”⁸⁰ This commentator further noted that when a party cannot get justice in the highest court, that does not mean that the government “is not unaccountable,” since resort to an international court can provide vindication. There was extensive media coverage of the First Instance Division decision in Kenya, including Karua tweeting a photo of herself cutting a cake with the caption: “Capping off a worthwhile effort advocating for electoral justice in defense of our democracy with celebratory cake. Heartfelt gratitude to all who fought alongside us, believing that rights matter and a better Kenya is possible.”⁸¹

What is notable about the First Instance Division decision in this case was that it has continued an EACJ trend of awarding monetary damages and issuances of declaratory orders.⁸² This is a departure from injunctions like the one issued in the *Nyong’o* case, and it is likely to result in political backlash from the powerful forces against which such orders would be directed. Ultimately, another remarkable feature of the First Instance Division’s decision is how it meticulously examined provisions under the Kenyan Constitution that the First Instance Division argued would have tilted the Kenyan Supreme Court’s decision in favor of Karua in a manner consistent with her right of access to justice. Thus, although the EACJ has repeatedly asserted that it is not an appellate court over the decisions over national courts in cases like this, the violation of treaty rights—particularly in politically controversial cases—makes its judicial interventions possible. Without a decision requiring an incumbent government to do no more than pay damages, the EACJ in turn minimized the potential backlash that might emerge

77. *Id.* ¶ 56.

78. *Id.* ¶ 60.

79. *Id.* ¶ 67.

80. Waikawa Wanyoike, *Understanding Martha Karua’s Judgment at East African Court of Justice*, THE STAR (Dec. 6, 2020), <https://www.the-star.co.ke/siasa/2020-12-06-understanding-martha-karuas-judgment-at-east-african-court-of-justice/> [<https://perma.cc/27RD-BTX5>].

81. Swala Nyeti, *Karua Cuts Cake to Celebrate Her Sh2.8 Million EACJ Victory*, SWALANYETI (Dec. 2020), <https://swalanyeti.co.ke/news/275/karua-cuts-cakes-to-celebrate-her-sh28-million-eacj-victory> [<https://perma.cc/W3VE-SPSP>].

82. For further analysis of this trend, see Solomon Eborbrah & Victor Lando, *Africa’s Sub-Regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question*, in THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL AND SOCIAL CHANGE 178–210 (James Thuo Gathii ed., 2021); Tomasz Milej, *East African Court of Justice: A Midwife of the Political Federation? The New Case-Law on the Remedies Awarded by the Court*, AFRONOMICSLAW (Oct. 22, 2019), <https://www.afronomiclaw.org/2019/10/22/east-african-court-of-justice-a-midwife-of-the-political-federation-the-new-case-law-on-the-remedies-awarded-by-the-court/> [<https://perma.cc/J7DF-WZ9F>].

from a decision that would be regarded as not only more politically embarrassing, but also politically intrusive.

D. *Christopher Mtikila v. Tanzania*

The *Mtikila* case is the first of two decisions from the African Court we analyze to complement the regional community court cases. The *Mtikila* case was a milestone decision of the African Court because it provided the applicant an opportunity to litigate in a forum that did not have the legislative and judicial barriers placed in his way in Tanzania. The dispute also exemplifies the strategies of plaintiffs to keep their dispute alive in the international courts when there was little prospect of doing so in their home country.

Brought before the African Court of Human and Peoples' Rights, *Christopher Mtikila v. Tanzania*⁸³ challenged Tanzania's prohibition of independent candidates in elections. Charismatic opposition politician the late Reverend Christopher Mtikila, like Martha Karua in the Kenyan case above, had litigated in domestic courts unsuccessfully before bringing his case to the African Court. However, unlike Karua, Mtikila had never been a powerful political personality. Instead, he was a thorn in the flesh of Tanzania's ruling party in power since independence in the 1960s, Chama cha Mapinduzi 'CCM' ("Party of the Revolution"). His case shows how he judicialized the prohibition of independent candidates both in Tanzanian courts and in the African Court of Human and Peoples' Rights to the chagrin of the CCM.

CCM opposed independent candidates running for elections after the reintroduction of multiparty politics in 1992.⁸⁴ CCM argued independent candidates would promote individualism, and disrupt peace, order and security.⁸⁵ A 1992 constitutional amendment required that all candidates for elective positions belong to and be sponsored by a political party.⁸⁶ Mtikila first attempted to register a political party in 1992 but his application was denied for failure to get membership from Zanzibar, as required by the Tanzanian Political Parties Act of 1992.⁸⁷ He first challenged the constitutional amendment in 1993 in the High Court of Tanzania and alleged that the bar against independent candidacy unfairly limited

83. *Tanganyika Law Society v. Tanzania*, App. Nos. 9/2011, 11/2011, Judgment, African Court on Human and Peoples' Rights [AFR. CT. H.P.R.] (Jun. 14, 2013).

84. See Barak Hoffman & Lindsay Robinson, *Tanzania's Missing Opposition*, 20 J. DEMOCRACY 123–36 (2009) (discussing the dominance of CCM and the strategies it has employed to silence/wipe out its competitors, that is "regulating political competition, the media, and civil society; blurring the boundary between the party and state; and the targeted use of blatantly coercive illegal actions.").

85. Frank Mateng'e, *Protesting the Independent Candidacy in Tanzania's Elections: A Bona Fide Cause?*, 5 J. POL. & L. 18, 18–32 (2012).

86. Alexander Makulilo, *'Join a Party or I Cannot Elect You': The Independent Candidate Question in Tanzania*, 6 CENT. EUR. U. POL. SCI. J. 111, 118 (2011).

87. Interview with Reverend Christopher Mtikila, National Chairman and Pastor of Full Salvation Church, Heaven on Earth: The Rise and Fall of Socialism, http://www.heavenearthdocumentary.com/interviews_mtikila.html [<https://perma.cc/3TFC-MU5E>].

his right to political participation and to free association.⁸⁸ The High Court unprecedentedly found in his favor, holding that the amendment was null and void.⁸⁹ Rather than follow on with an appeal, the Government, through Parliament, amended the Constitution that again prohibited independent candidates from contesting elections.⁹⁰ The effect of this amendment was to nullify the 1994 High Court decision that had allowed independent candidates.

Mtikila challenged this in the High Court once again. The High Court held in his favor and confirmed the earlier finding in 1994.⁹¹ The Government thereafter appealed to the Court of Appeal, the highest court in Tanzania. The Court of Appeal held that the independent candidacy issue was a political question to be determined by Parliament.⁹² The Court of Appeal also held that since the requirement of membership to a political party was now embedded in the Constitution pursuant to a constitutional amendment, the courts had no power to amend the Constitution, as this was a Parliamentary function.⁹³ Having no domestic recourse available, Mtikila filed a case in the African Court. What the foregoing makes clear is the manner in which Mtikila judicialized an issue that pitted him against a ruling party that was willing to override judicial decisions through constitutional amendments. In other words, the ruling party's desire to protect itself from political competition in the era of multiparty politics—in our view—catapulted the question of independent candidates presented to the African Court on Human and Peoples' Rights into a mega-political dispute.

As James Gathii and Jacqueline Mwangi have argued, the African Court presented Mtikila with a number of advantages.⁹⁴ First, it provided him with an opportunity to litigate in a forum that did not have the legislative and judicial barriers placed in his way in Tanzania. This is particularly important because the dominance of the CCM party and its style of governance has resulted in a “de facto one-party state” where the government and the ruling party operate as a single entity.⁹⁵ Second, litigating in the African Court gave Mtikila a platform to keep the issue of independent candidature and the political repression of CCM in the spotlight. Third, Mtikila hoped that the African Court would provide a neutral arbiter forum for him given the fact that Tanzanian courts had failed to do so. As one media outlet editorialized after Mtikila decided to bring the court

88. Makulilo, *supra* note 86, at 119.

89. *Id.* at 120; *see also* Mateng'e, *supra* note 85, at 20.

90. Mateng'e, *supra* note 85, at 21; Makulilo, *supra* note 86, at 121.

91. Makulilo, *supra* note 86, at 121–22.

92. Mtikila v. Att'y Gen., Misc. Civil Cause No. 10 of 2005, [2006] TZHC at 49 (Tanz.) (May 5, 2006), https://www.tanzania.go.tz/egov_uploads/documents/AttorneyGeneralVsChristopherMtikila_45_OF_2009_sw.pdf [<https://perma.cc/K5H2-2E5J>].

93. *Id.* at 48–49.

94. James Gathii & Jacqueline Mwangi, *The African Court on Human and Peoples' Rights as a Legal Opportunity Structure*, in *THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL AND SOCIAL CHANGE* 212, 241–43 (James Thuo Gathii ed., 2021).

95. Makulilo, *supra* note 86, at 124.

to the African Court on Human and Peoples' Rights, if "you can't beat the establishment the first three times, there's always Arusha."⁹⁶ The African Court is based in Arusha, Tanzania. Fourth, once Mtikila brought the case and was successful in getting a ruling in his favor, he used it to mobilize further against CCM. Civil society groups praised the court's decision providing the Tanzanian press opportunities to report coverage critical of the government's politically repressive practices against opposition politicians.⁹⁷

The politically contentious nature of the dispute before the African Court on Human and Peoples' Rights can be gleaned from some of the arguments Mtikila advanced in the case. He argued that the rule of law was a principle of customary international law. As such, it was his claim that by initiating a constitutional amendment to settle a legal dispute pending before a domestic court which nullified the court's judgment, Tanzania abused the process of constitutional amendment and, therefore, the principle of the rule of law. Although this particular argument did not succeed, the African Court agreed that Tanzania's independent candidate ban violated Mtikila's rights to free association, to participate freely in government, to equality before the law, and to the right to enjoy all those rights under the African Charter on Human and Peoples' Rights. By judicializing his dispute in the African Court, Mtikila was able to contest his exclusion from Tanzanian politics in a forum that CCM did not control. Like litigants who judicialize contentious political disputes before Africa's international courts, Mtikila knew quite well that a victory would not necessarily result in compliance.⁹⁸ There is another reason why this case is significant. In a subsequent ruling, the African Court for the first time issued a ruling on compensation and reparation thereby setting a new precedent that litigants have continued to rely on for relief.⁹⁹

96. Elsie Eyakuze, *If You Can't Beat Gov't the First Three Times, Do Not Despair, There's Always Arusha*, THE E. AFR. (Aug. 3, 2013) <http://www.theeastafrican.co.ke/oped/comment/If-you-cant-beat-govt-the-first-3-times-there-is-always-Arusha-/434750-1935612-70q1jn/index.html> [<https://perma.cc/N4XF-36YL>].

97. For example, the International Federation of Human Rights (FIDH), an affiliate of Tanzania's Legal & Human Rights Centre, said of the Mtikila decision in the African Court: "[T]his decision demonstrates two fundamental things. First of all, it clearly shows that the African Court has a significant role to play in the interpretation of the human rights instruments freely adopted and ratified by our governments. Besides, it is another illustration of the positive role that can be played by NGOs and individuals in guaranteeing the effectiveness of the Court." Press Release, Int'l Fed. For Human Rights, African Court Orders Tanzania to Guarantee Civil and Political Rights. A Victory for Democracy! (Jun. 18, 2013), <https://www.fidh.org/en/region/Africa/tanzania/13488-african-court-orders-tanzania-to-guarantee-civil-and-political-rights-a> [<https://perma.cc/M6LC-MVKY>].

98. Oliver Windridge, *Mtikila v. Tanzania: Ruling on Reparations*, THE ACTHPR MONITOR (Jul. 15, 2014), <http://www.acthprmonitor.org/mtikila-v-tanzania-ruling-on-reparations/> [<https://perma.cc/86TM-VAE4>] (noting that although the Mtikila case was decided in 2013, the Tanzanian government has yet to implement the court's recommendations to take constitutional, legislative and all necessary measures to remedy its violations and that the government's main contention has been that the case was wrongly decided and was inconsistent with Tanzania's Constitution).

99. Oliver Windridge, *A Watershed Case for African Human Rights: Mtikila and Others v. Tanzania*, OXFORD HUM. RTS. HUB (Feb. 17, 2015), <https://ohrh.law.ox.ac.uk/a-watershed-case-for-african-human-rights-mtikila-and-others-v-tanzania/> [<https://perma.cc/GY4T-4DR6>].

E. *Houngue Éric Noudehouenou v. Republic of Benin*

The last case we analyze in the selected cases from Africa's international courts is the 2020 decision of the African Court of Human and People's Rights *Houngue Éric Noudehouenou v. Republic of Benin* ("Houngue").¹⁰⁰ This case adds to the growing body of human rights jurisprudence of high profile political cases on national electoral processes in Africa's international courts.¹⁰¹ As one of us has argued elsewhere, the judgment "contributes to the density of mega-political jurisprudence of Africa's regional and subregional courts."¹⁰² The case also illustrates that at times, judicialization of mega-political election disputes reinforces or entrenches a repressive and powerful executive.

The *Houngue* case was sparked by a series of amendments to the 1990 Constitution of the Republic of Benin (Benin), Law No. 2019-40 (Revised Constitution), and changes to Benin's electoral law.¹⁰³ Houngue argued that the cumulative effect of the amendments violated his right to stand for election in the upcoming 2021 presidential election as an independent candidate, as well as his right to freedom of expression and freedom of association. This case therefore raised some of the same legal issues as the Tanzanian Mtikila independent candidate case before the same court discussed above.

Like Mtikila in Tanzania, Houngue was a thorn in the flesh of the government in Benin. To disqualify him from running for political office, in 2018, Houngue was arrested and charged with embezzling public funds. In March 2019, the Investigating Committee of the Court for the Repression of Economic Crimes and Terrorism (CRIET) referred him to the Correctional Chamber of that Court with a new charge for complicity in the abuse of office. He was convicted, and on July 25, 2019, he was sentenced to ten years' imprisonment. The detention that led to Houngue's conviction before the CRIET was part of a wider crackdown against opposition politicians in Benin. Since this case involved a familiar pattern of dele-

100. *Noudehouenou v. Benin*, App. No. 003/2020, Judgment, African Court on Human and Peoples' Rights [AFR. CT. H.P.R.], (Dec. 4, 2020), https://www.african-court.org/en/images/Cases/Judgment/003-2020-Houngue_Eric_Noudehouenou_v_Benin-_Judgment.pdf [<https://perma.cc/V2MT-QVPM>].

101. See Gathii & Mwangi, *supra* note 94, at 212 (discussing fair trial violation cases decided by the African Court of Human & Peoples' Rights).

102. Olabisi D. Akinkugbe, *Houngue Éric Noudehouenou v. Republic of Benin*, 115 AM. J. INT'L L. 281, 286 (2021).

103. Among other claims, the Houngue argued that the elections to the National Assembly conducted pursuant to Law No. 2018-31 of September 3, 2018 were neither transparent nor conducted in compliance with the Revised Constitution and the Electoral Code. Previous attempts in 2006, 2011, and 2017 to amend the 1990 Constitution were met with popular resistance and dismissed by Benin's Constitutional Court. To circumvent this, the government appointed a new Constitutional Court president, who many believed was close to President Patrice Talon, having previously been his private lawyer. David Zounmenou, *Crisis of Confidence in Benin Deepens*, INST. SEC. STUD. (Dec. 17, 2020), <https://is-safrica.org/iss-today/crisis-of-confidence-in-benin-deepens> [<https://perma.cc/JGL7-LUAN>]. For mega-political dimensions of the Houngue's case, see Akinkugbe, *supra* note 102, at 281-82.

gitimizing an opposition politician who posed an electoral threat to a powerful incumbent, it therefore has the hallmarks of a mega-political dispute.¹⁰⁴ Under the new electoral system ushered in by the Revised Constitution and amended electoral code, political parties must pay 249 million CFA francs (approximately \$400,000 USD) to field candidates in parliamentary elections. In addition, parties were required to secure ten percent of the total national vote to enter the legislature, forcing local parties to build a national presence. Only two parties met the criteria to win seats in Parliament in 2019—the Republican Bloc and the Progressive Union. Both were loyal to the president. The stringent eligibility criteria created additional hurdles making it more difficult for opposition parties to field candidates. While President Talon argued that a tougher threshold would enhance Benin’s fragmented Parliament, Houngue and other opposition politicians, condemned this as a violation of their rights to free association and participation in democratic governance. The municipal elections of May 2020 continued the democratic erosion in Benin, further shrinking space for political opposition.¹⁰⁵ The elections were conducted amidst protests by many Beninese which occurred during the COVID-19 pandemic. The only opposition party to participate—Forces Cauris pour un Bénin Emergent (“FCBE”)—won a majority in seven out of Benin’s seventy-seven municipalities. These municipal elections had direct consequences for the presidential election of April 2021. Pursuant to Article 44 of the Revised Constitution, which was passed by a national assembly, composed solely of elected representatives of the party in power, this amendment required presidential and vice-presidential candidates to be sponsored by at least sixteen parliamentarians or mayors.

From the foregoing, it is evident that the April 2021 presidential elections would have been conducted in the shadow of an incumbent who had taken active steps to limit opposition political parties and politicians from participating in a free and fair election. The fact that the incumbent controlled both the Constitutional Court and the electoral commission meant that resort to an international court was a viable alternative. After the case was filed, the African Court on Human and Peoples’ Rights (African Court) ordered provisional measures in favor of Houngue on two separate occasions. The operative parts of the African Court’s first provisional measure required Benin stay the execution of the CRIET decision until it pronounced its own final judgment, and that Benin report on the implementation of the order within thirty days. The second interim measure was prompted by Benin’s failure to comply with the order arising from the first provisional measure and required Benin to take all necessary measures to effectively remove any administrative, judicial, and political obstacles to

104. See DARIN CHRISTENSEN & DAVID D. LAITIN, *AFRICAN STATES SINCE INDEPENDENCE: ORDER, DEVELOPMENT, & DEMOCRACY* 282–97 (2019) (discussing the oft-used tactic of delegitimizing the opposition in the context of undemocratic undercurrents in Africa’s fledgling democracies).

105. Ella Jeannine Abatan & Michaël Matongbada, *Benin’s Local Elections Further Reduce the Political Space*, INST. FOR SEC. STUD. (May 27, 2020), <https://issafrica.org/iss-today/benins-local-elections-further-reduce-the-political-space> [<https://perma.cc/43S4-GJJJ>].

Houngue's candidacy in the forthcoming elections.¹⁰⁶

In the substantive arguments before the African Court, Houngue argued that his right to appeal the CRIET judgment under the Universal Declaration of Human Rights ("UDHR") Article 10, the African Charter on Human and Peoples' Rights ("Charter") 7(1)(a), and the International Covenant on Civil and Political Rights ("ICCPR") Article 2(3) had been violated.¹⁰⁷ Houngue argued that by requiring Beninese citizens to vote only for candidates chosen and endorsed by political parties, Article 153-1 of the Revised Constitution violated his right to freedom of expression as enshrined in ICCPR Article 19(2). He argued that Benin's actions violated various regional and international human rights instruments protecting the freedoms of association and expression, and the right to nondiscrimination. In his request for relief, Houngue asked the African Court for a mandatory order requiring Benin to take all necessary constitutional, legislative, and associated measures to end the alleged violations of his rights in advance of the forthcoming elections. He also sought order that Benin should report the implementation of these orders to the Court.

In response, Benin argued that the Court lacked jurisdiction to scrutinize or annul its Constitution and electoral Code. In the alternative, the government contended that the matter was inadmissible, as Houngue lacked the *locus standi* to initiate the proceeding. In short, Benin sought a declaration that it did not violate any of Houngue's human rights.

In its judgment, the African Court held that it had material jurisdiction over the case. It noted that human rights violations arose out of the African Charter on Human and Peoples' Rights and other international human rights instruments ratified by Benin. Further, the Court found that Houngue had exhausted local remedies and fulfilled the conditions for admissibility. The Court made four findings regarding alleged human rights violations. First, it found that Benin did not violate Houngue's right to an effective remedy. Second, it held that Benin violated its obligation under Article 10(2) of the African Charter on Democracy, Election and Good Governance (ACDEG) because the fact that "the Revised Constitution was passed unanimously cannot conceal the need for national consensus driven by the 'ideals that prevailed during the adoption of the Constitution of 11 December 1990' and . . . the ACDEG."¹⁰⁸ Third, in view of Benin's non-compliance with the ACDEG process for the amendment of the Constitution,

106. *Noudehouenou v. Benin*, App. No. 003/2020, Ruling, African Court on Human and Peoples' Rights [AFR. CT. H.P.R.] ¶¶ 5–9 (Sept. 25, 2020), https://www.african-court.org/en/images/Cases/Orders/App1_003-2020_-_Houngue_Erc_-_RULING_-_Engl.pdf [https://perma.cc/6X85-UYS5].

107. He also contended that he was prohibited from filing an appeal under Article 19 of the 2018-13 Act of July 2 establishing CRIET. *Noudehouenou v. Benin*, App. No. 004/2020, Ruling, African Court on Human and Peoples' Rights [AFR. CT. H.P.R.] ¶¶ 7–9 (May 6, 2020), <https://www.african-court.org/en/images/Cases/RulingOnJurisdiction/App1.004-2020-Houngue-Eric-NoudeHouenou-v-Benin--Order-on-provisional-measures.pdf> [https://perma.cc/2N7Y-5JRJ].

108. *Noudehouenou v. Benin*, App. No. 003/2020, Judgment, African Court on Human and Peoples' Rights [AFR. CT. H.P.R.] ¶ 65 (Dec. 4, 2020), https://www.african-court.org/en/images/Cases/Judgment/003-2020-Houngue_Eric_Noudehouenou_v_Benin-_Judgment.pdf [https://perma.cc/MX6K-5KQS].

the African Court found it was unnecessary to rule on the alleged violations of rights to participate in public affairs, equality, freedom of association, freedom of religion, and freedom of expression as envisaged under the Revised Constitution. Fourth, the Court found that Benin violated Houngue's right to be presumed innocent under UDHR Article 11 and Article 13(3) of the Charter (para 105). Consequently, the African Court ordered Benin to take all measures to repeal the law revising the 1990 Constitution and all subsequent laws relating to the election pursuant to that revision in order to guarantee that its citizens, including Houngue, participate freely in the forthcoming presidential election.

To understand the broader sociopolitical and legal contest of Houngue's case, one has to see it as part of a wider and growing mobilization of the African Court by opposition politicians and opposition political parties as an alternative forum for engaging in political warfare against repressive national governments and for mobilizing social movements.¹⁰⁹ Like its sister subregional courts, the African Court does not have jurisdiction to review election disputes arising out of political processes in its member states.¹¹⁰ However, for over a decade, political stakeholders and civil society actors have transformed Africa's subregional courts into alternative fora for resistance and protest against their governments.¹¹¹ This case, like the others analyzed in this article, is further evidence about how opposition politicians and dissidents have resorted to international courts to judicialize election disputes in their home countries.

Cases like Houngue are slowly beginning to redefine the boundaries of the dockets in Africa's international courts. One of the key features making this possible is the openness of Africa's regional and subregional courts to these sorts of disputes. This openness provides the gateway through which opposition politicians and political parties increasingly bring these cases.

The rationale for the judicialization of political disputes arising from electoral processes or constitutional amendments relating to the law of democracy is not simply about emerging victorious in the particular case. Political disputes are judicialized in the African Court as a part of the quest of opposition politicians and political parties in defending political freedom. Even where applicants lose the case, strategic litigation can have a significant instrumental value.¹¹² For example, through coordinated efforts with the media, litigants use such cases to launch campaigns to pressure their governments to act as law-abiding members of the international community.¹¹³

However, *Houngue's* case also illustrates some dilemmas for litigants. Rather than creating new political equilibria, some of the disputes that are judicialized

109. *Towards an Analyses*, *supra* note 11, at 163, 170, 174–76; Gathii & Mwangi, *supra* note 94, at 213–14, 242–49; Adem Kassie Abebe, *Taming Regressive Constitutional Amendments: The African Court as a Continental (super) Constitutional Court*, 17 INT'L J. CONST. L. 89, 99 (2019).

110. See generally Frans Viljoen, *Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights*, 67 INT'L & COMP. L. Q. 63 (2018).

111. GATHII, *supra* note 4, at 19–25.

112. *Towards an Analyses*, *supra* note 11, at 176–77.

113. Gathii & Mwangi, *supra* note 94, at 244–25, 252–53.

in African courts have resulted in the hegemonic preservation of incumbents.¹¹⁴ This is a challenge that confronts opposition or dissident politicians and political parties that judicialize election disputes before Africa's international courts, particularly where they confront a repressive and authoritarian executive regime. In *Benin's* case, despite the orders from the African Court, the repressive regime of President Tallon spurred a reaction in the opposite direction: boycott of the elections by both opposition politicians and low electoral turn out,¹¹⁵ as well as harassment of opposition politicians through arrests, detentions or outrightly being declared ineligible, and in some cases forced exile.¹¹⁶ Indeed, the only two candidates—Coretin Kohoué and Alassane Soumanou—who were validated by the courts to contest against the incumbent President were viewed as weak and detractors as opposed to real contenders.¹¹⁷ As we argued in previous parts of the article, the Constitutional amendments undertaken by President Talon consolidated and strengthened his candidacy. In the end, the case shows the complexity of judicializing mega-political disputes before Africa's international courts. The lesson here is clear. In particularly repressive regimes, judicialization in international courts standing on its own is insufficient to mobilize against marginalization of opposition political parties and politicians.

Before moving to discuss two national court election cases in Part IV, it is notable that the election cases before Africa's international courts indicate their openness to these cases, notwithstanding the fact that governments without fail challenge their jurisdiction. The best way to understand the outcome in these cases is that, if plaintiffs can show that the violation complained of would harm the right to participate in the electoral process, they will probably be vindicated. Many of the outcomes in these cases show that these international courts vindicate the claims of the plaintiffs, but they are more likely than not to hedge their findings with declaratory orders that will unlikely anger the governments at which they are directed. These cases also show that opposition politicians and political parties resort to international courts especially where the political opportunity structures in their domestic contexts provide little or no openings for them to achieve their goals.

114. See, e.g., *Opposition Sideline as Benin Votes in Presidential Election*, AL JAZEERA (Apr. 11, 2021), <https://www.aljazeera.com/news/2021/4/11/benin-votes-in-presidential-election-opposition-sideline> [https://perma.cc/TN66-3XKS].

115. *Benin Vote Count Begins After Opposition Groups Boycott Election*, AL JAZEERA (Apr. 11, 2021), <https://www.aljazeera.com/news/2021/4/11/vote-counting-in-benin-after-election-marked-by-violent-protests> [https://perma.cc/28BN-MD7L].

116. "Several key opposition figures—including an ex-prime minister and a former mayor of the biggest city Cotonou—have either been arrested and ruled ineligible or are now in exile." *Benin Election: The Fight for a Democratic Future*, BBC (Apr. 11, 2021), <https://www.bbc.com/news/world-africa-56690689> [https://perma.cc/2ME6-DHH4]. Other high profile opposition politicians who were ousted are: Sébastien Ajavon—a businessman who came third in 2016's presidential election, now in exile; Lionel Zinsou—the former prime minister was accused of campaign overspends then barred from running for office for four years; Léhady Soglo—ex-Cotonou major and son of a former president, now living in exile and sentenced in absentia to 10 years in jail for "abuse of office"; and Reckya Madougou—presidential candidate for The Democrats party, accused of terrorism.

117. *Id.*

In both the *Mtikila* and *Hongue* cases, we saw how politicians that were “a thorn in the flesh” of highly authoritarian regimes see international courts as an outlet for their frustrations.¹¹⁸ Thus, it is not only powerful opposition politicians like Karua in the Kenya case before the East African Court of Justice that resort to international courts. At the center of most of these cases is the right to free participation for opposition parties and politicians in election systems that are dominated by powerful political parties and politicians. Although plaintiffs invariably won these cases and on occasion got provisional orders for anticipatory violations, incumbent political parties and politicians did not fully comply with those orders. Plaintiffs bringing those cases, this article shows, did not bring these cases seeking compliance. Rather, the plaintiffs sought goals such as increased visibility, since they struggle to get such visibility in an electoral and media environment dominated by dominant parties. Further, these plaintiffs seek to achieve broader goals. These include calling attention to the repression of political parties and those violations, as well as galvanizing their supporters, perhaps anticipating and hoping the incumbents will remember to comply with the rules of fair and free elections in the next election.

IV

JUDICIALIZATION OF MEGA-POLITICAL ELECTORAL DISPUTES IN NATIONAL COURTS

So far, we have discussed judicialization of mega-political electoral disputes in Africa’s international courts. Our analysis would be incomplete without pointing out two unprecedented cases in national courts that have overturned presidential elections in which an incumbent had been elected inconsistently with national law. Both cases came several years after Africa’s international courts had inaugurated rigorous and independent review of national election cases. These two cases suggest to us that in countries like Malawi and Kenya—with independent judiciaries that have reversed illegal presidential elections—opposition politicians and political parties would prefer to have their electoral grievances determined in their home national courts than take them to international courts. Our aim in reviewing these cases is not to suggest that national courts have done better than international courts in reviewing election cases. Rather, by discussing these two cases, we aim to show that judicial review of electoral processes is gaining traction in both Africa’s international and national courts.

118. See Lucy Oriang, *There Must Be No Turning Back for this ‘Iron Lady,’* NATION (Apr. 9, 2009) <https://nation.africa/kenya/blogs-opinion/opinion/there-must-be-no-turning-back-for-this-iron-lady—588182?view=htmlamp> [<https://perma.cc/Z4XS-ENRW>] (noting in part that Martha Karua “has grown in stature against all odds, earning the reputation of a brave warrior . . . [and further noting that] [n]ow that she has seen the light and returned to the backbench, she can do what she excels at — being a thorn in the flesh of the cabal that tormented her.”).

A. *Peter Mutharika v. Lazarus Chakera and Saulos Chilima*

Our first example from Malawi is *Peter Mutharika v. Lazarus Chakera and Saulos Chilima*.¹¹⁹ This case decided by Malawi's Supreme Court on May 8, 2020 affirmed the decision of Malawi's Constitutional Court annulling the election that returned the then sitting President Professor Peter Mutharika to power. This case typifies the high political stakes in a two-horse presidential race involving an incumbent and a former ally turned challenger and opposition politician. Vice-President Mr. Saulos Chilima was a one-time Vice-President of Peter Mutharika. He had broken away from the ruling party and formed the United Transformation Movement.¹²⁰ President Mutharika's return by the Malawi Electoral Commission as winner of the May 21, 2019 presidential election by a slim margin over main opposition candidates¹²¹ Lazarus Chakwera and Saulos Chilima sparked widespread protests on the basis of claims that the polls were marred by irregularities, rigged and unfair.¹²² The evidence of widespread irregularities was confirmed when evidence emerged that the official results sheets released by the national electoral body showed a consistent pattern of the use of whiteout that suggested the results had been manipulated.¹²³

On February 3, 2020, the Constitutional Court agreed with the petitioners that the election had been rigged.¹²⁴ A new election was ordered to be conducted within 150 days of that decision. President Mutharika and the Malawi Electoral Commission appealed to the Supreme Court of Malawi.¹²⁵ On May 8, 2020, Malawi's Supreme Court affirmed the decision of the Constitutional Court and ordered a rerun of the election with the original candidates.¹²⁶

The rerun of the election was conducted in late June 2020. The opposition

119. *Mutharika v. Chilima* [2020] MWSC 1, 69 (Malawi), <https://malawilii.org/mw/judgment/supreme-court-appeal/2020/1> [<https://perma.cc/7BM9-AAR9>].

120. Rushdi Nackerdien, *Elections in Malawi: 2019 General Elections*, INT'L FOUND. FOR ELECTORAL SYS. (May 17, 2019), <https://www.ifes.org/faqs/elections-malawi-2019-general-elections> [<https://perma.cc/W64S-2GKX>].

121. *Malawi's Mutharika Wins Reelection by Slim Margin*, CCTN AFR. (May 28, 2019), <https://africa.cgtn.com/2019/05/28/malawis-mutharika-wins-reelection-by-slim-margin/> [<https://perma.cc/V7XJ-G59S>].

122. *Malawi Activists Resume Protests Over Presidential Vote Result*, NEWS24 (Sept. 18, 2019), <https://www.news24.com/news24/africa/news/malawi-activists-resume-protests-over-presidential-vote-result-20190918> [<https://perma.cc/FK32-HPBD>].

123. Luke Tyburski, *Demystifying Malawi's 'Tipp-Ex Election'*, ATLANTIC COUNCIL (Aug. 6, 2019), <https://www.atlanticcouncil.org/blogs/africasource/demystifying-malawi-s-tipp-ex-election/> [<https://perma.cc/YD83-W8CP>].

124. *Chilima v. Mutharika* [2020] MWHC 2, ¶¶ 1476–77 (Malawi), <https://malawilii.org/mw/judgment/high-court-general-division/2020/2> [<https://perma.cc/S5NW-XHWP>].

125. Laura Angela Bagnetto, *Malawi's President Says He Will Appeal Court Ruling; Malawians Hail Inclusive Proceedings*, RFI (May 2, 2020), <https://www.rfi.fr/en/international/20200205-malawi-s-president-says-he-will-appeal-court-ruling-malawians-hail-inclusive-> [<https://perma.cc/K8LY-3JXX>].

126. Laura Angela Bagnetto, *Malawi's Supreme Court Rules in Favour of Election Rerun, but only with Original Candidates*, RFI (Aug. 5, 2020), <https://www.rfi.fr/en/africa/20200508-malawi-s-supreme-court-rules-in-favour-of-election-rerun-but-only-with-original-candidates> [<https://perma.cc/W8UB-XR4Y>].

candidate Lazarus Chakwera won the election rerun.¹²⁷ While the opposition parties celebrated their victory on the heels of a peaceful and transparent election, the outgoing President declared the election as the worst in the country's history.¹²⁸

The decision of the Supreme Court of Malawi that annulled the initial election sparked an immediate backlash from the president. Immediately after the Supreme Court's decision, President Mutharika summarily sent the Chief Justice of Malawi Justice Nyirenda who presided over the nullification of Mutharika's election, the Right Hon. Andrew K. C. Nyirenda, S.C., on leave pending retirement.¹²⁹ This decision sparked significant critical scrutiny from inside and outside Malawi.¹³⁰ In particular, the Malawian High Court judges granted injunctions preventing President Mutharika from sending Chief Justice Nyirenda on leave following a petition filed by the Malawi Human Rights Defenders Coalition (HRDC), the Association of Magistrates, and the Malawi Law Society.¹³¹ In an interview, Gift Trapence, the Chairperson of the HRDC stated that:

“We don't want a lawless country where the executive thinks that they are the law themselves. We want to safeguard the rule of law in this country. We want to safeguard the independence of the judiciary. No one should attack the judiciary which had been the case by the DPP [Democratic Progressive Party] government including the president.”¹³²

Malawian academics,¹³³ the Malawi Law Society,¹³⁴ civil society groups,¹³⁵ and judges from neighboring countries¹³⁶ weighed in in support of the judiciary. These

127. Lameck Masina, *Malawi Opposition Leader Wins Fresh Elections with Landslide Victory*, VOA NEWS (June 28, 2020), <https://www.voanews.com/africa/malawi-opposition-leader-wins-fresh-elections-landslide-victory> [<https://perma.cc/PZD8-VVHC>].

128. *Malawi Leader Blasts Election Rerun as Opposition Poised to Win*, ALJAZEERA (June 27, 2020), <https://www.aljazeera.com/news/2020/06/27/malawi-leader-blasts-election-rerun-as-opposition-poised-to-win/> [<https://perma.cc/UDU9-793M>].

129. Charles Pensulo, *Forced Retirement of Malawi's Chief Justice Before June Election Blocked*, THE GUARDIAN (June 16, 2020), <https://www.theguardian.com/global-development/2020/jun/16/forced-retirement-of-malawis-chief-justice-before-june-election-blocked> [<https://perma.cc/LS57-DKK3>].

130. *See id.* (documenting the response amongst law and civil society groups).

131. Wongani Chiuta, *Judge Mkandawire Grants Injunction Against Chief Justice Forced Leave: Orders Judicial Review*, NYASA TIMES (June 14, 2020), <https://www.nyasatimes.com/judge-mkandawire-grants-injunction-against-chief-justice-forced-leave-orders-judicial-review/> [<https://perma.cc/PU8X-9M9Y>].

132. Pensulo, *supra* note 129.

133. Maneno Chimulala, *Legal Scholars Fault Malawi Gov't on Retirement of Chief Justice Andrew Nyirenda*, MARAVI POST (June 14, 2020, 6:33 AM), <https://www.maravipost.com/legal-scholars-fault-malawi-govt-on-retirement-of-chief-justice-andrew-nyirenda/> [<https://perma.cc/ER27-4NRF>].

134. Lameck Masina, *Malawi Lawyers Protest Government's Role in Judiciary*, VOA NEWS (June 17, 2020, 9:23 PM), <https://www.voanews.com/africa/malawi-lawyers-protest-governments-role-judiciary> [<https://perma.cc/2AZB-Z8VV>].

135. *Joint Statement on the Threats Against the Independence of Judges in Malawi*, AFRICANDEFENDERS (June 15, 2020), <https://africandefenders.org/the-independence-of-judges-in-malawi/> [<https://perma.cc/5ANX-DWYF>].

136. Green Muheya, *Southern Africa Chief Justices' Forum Condemn Mutharika Over Malawi Judiciary Attacks*, NYASA TIMES (June 15, 2020), <https://www.nyasatimes.com/southern-africa-chief-justices-forum-condemn-mutharika-over-malawi-judiciary-attacks/> [<https://perma.cc/323G-LLSR>].

groups, together with other civil society groups¹³⁷ and law professors from around the world, condemned the assault on the judiciary.¹³⁸ Even the Malawian judiciary rejected how the President undermined its independence.¹³⁹ They also criticized President Mutharika, arguing that he was “falsely accusing the judiciary of having staged a coup against his government and claiming that Parliament is supreme in Malawi.”¹⁴⁰

A letter from Mr. Burton Chigo Mhango, President of the Malawi Law Society, dated June 28, 2020 in the wake of the swearing in of the new president demonstrates this coordination in response to Mutharika’s removal of the Chief Justice from office.¹⁴¹ Mr. Mhango thanked “the Lawyers, the Judiciary, the Police, the Armed Forces and the people of Malawi on the historic election.”¹⁴² In short, political pressure from inside and outside Malawi against an incumbent President whose presidential election had been nullified was amplified by the courageous judicial reversal of his election.

Most notably, the nullification of President Mutharika’s election was predicated on an unprecedented interpretation of Malawi’s election laws. Rather than follow the precedent in commonwealth countries that require a showing of irregularities sufficient to overturn an election, known as the quantitative test, courts in Malawi had followed a 2017 Kenyan Supreme Court case that nullified Kenya’s 2017 presidential election on the basis of a new understanding of election law—the qualitative test. This case from Malawi then shows that there are some instances in which relying on domestic courts rather than judicializing an election case in an international court is best strategy.

137. See generally *Statement on Actions of the Government of Malawi Against the Chief Justice and Judiciary of Malawi*, COMMONWEALTH LAWYERS ASSOCIATION (June 15, 2020), https://www.commonwealthlawyers.com/wp-content/uploads/2020/06/CMJA-CLEA-CLA-Rechters_voor_Rechters_Statement_on_Malawi_150620.pdf?utm_medium=email&utm_campaign=Malawi%20Statement&utm_content=Malawi%20Statement+CID_db2fba5b79c9119a991c1956c62240a5&utm_source=ThinkMailer&utm_term=here [<https://perma.cc/UG4U-9Q4X>] (highlighting a statement issued by The Commonwealth Magistrates’ and Judges’ Association (“CMJA”), The Commonwealth Legal Education Association (“CLEA”), the Commonwealth Lawyers Association (“CLA”) and Rechters Voor Rechters (Judges for Judges condemning the actions of the Malawi government)).

138. See *World’s Law Professors and Academics Condemn Executive Assault on Malawi Judiciary*, NYASA TIMES (June 15, 2020), <https://www.nyasatimes.com/worlds-law-professors-and-academics-condemn-executive-assault-on-malawi-judiciary/> [<https://perma.cc/9VP4-JZXD>] (documenting the perspective of law professors and academics from around the world condemning the Malawi government’s actions and expressing concern that it is undermining the judiciary).

139. Antony Sguazzin & Frank Jomo, *Malawian Judiciary Rejects Government Bid to Sideline Top Judge*, BLOOMBERGQUINT (June 15, 2020), <https://www.bloomberquint.com/politics/malawi-s-chief-justice-placed-on-leave-ahead-of-election> [<https://perma.cc/D572-SU4X>].

140. The authors have a copy of this letter on file.

141. Letter from Burton Chigo Mhango, President of the Malawi Law Society (June 28, 2020) (on file with authors).

142. *Id.* Mr. Mhango also noted the roles of some past and present Chief Justices from other countries in petitioning the Mutharika regime to comply with the rule of law as well as a joint statement signed by forty-seven democracy and justice institutions including East Africa Law Society.

B. *Raila Odinga v Uhuru Kenyatta*, Supreme Court of Kenya (2017)

Here we discuss the 2017 *Odinga v Uhuru* case for two reasons. First, to fortify the argument made in the discussion of the Malawi case—that we now have at least two countries with national judiciaries that have overturned Presidential elections. That means that resort to international courts in at least those two cases was not a superior alternative. Second, to emphasize the turn towards a new understanding of interpreting election laws in both Malawi and Kenya, which shows a similar pattern in election cases filed in Africa’s international courts to support judges against backlash for defying powerful incumbents by deciding against them.

The 2017 presidential election in Kenya was a highly divisive and contentious two-horse race—a replay from yet a similar election in 2013. When Raila Odinga contested Uhuru’s 2013 win, the Supreme Court of Kenya rejected his petition by invoking a quantitative test to determine whether there were sufficient irregularities to overturn the election. Under that test, an election was considered valid not on the basis of the number of errors found but upon the effect of those errors on the results.¹⁴³ The high-octane politics of the 2013 presidential elections came on the heels of international criminal court indictments of its eventual winners, President Uhuru Kenyatta and Deputy President William Ruto. The 2017 election was therefore a replay of the high drama that has characterized the last three Presidential elections in Kenya, pitting Uhuru Kenyatta against the equally nationally popular opposition leader Raila Odinga. The 2017 presidential election was characterized by many of the irregularities of the 2013 election that tilted the playing field in an extremely favorable position for Uhuru Kenyatta. Thus, the petition against the electoral irregularities in the Supreme Court of Kenya following the 2017 presidential election hinged on whether a new interpretation of the election law could be offered. The 2017 Supreme Court of Kenya decision in *Raila v Uhuru* did indeed adopt a new interpretation of the election law, referred to as the qualitative test. The qualitative test looks at “if the irregularity concerned or the cumulative effect of the many irregularities or malpractices shown to have been committed in the conduct of an election are so pervasive and/or so widespread that the integrity of the electoral process is put to question, and there is serious doubt cast on the validity of the numerical magic number[] and/or the same is indeterminate.”¹⁴⁴ On the basis of this new test, the Supreme Court nullified the 2017 presidential election.

President Uhuru Kenyatta was outraged. He called the judges a bunch of thugs.¹⁴⁵ The Kenyan bar and civil society groups rallied to defend the judiciary

143. *Odinga v. Indep. Electoral & Boundaries Comm’n [IEBC]* (2013), ¶ 29 (S.C.K.) (Kenya), <http://kenyalaw.org/caselaw/cases/view/87380/> [<https://perma.cc/PD4V-AU9V>].

144. *Wetang’ula v. Indep. Electoral & Boundaries Comm’n [IEBC]* (2013), ¶ 79 (C.A.K.) (Kenya), <http://kenyalaw.org/caselaw/cases/view/95829/> [<https://perma.cc/CWR4-JW3Y>], cited with approval in *Odinga v. Indep. Electoral & Boundaries Comm’n [IEBC]* (2017) S.C.K. (Kenya), <http://kenya-law.org/caselaw/cases/view/140716/> [<https://perma.cc/A2JZ-6TH8>].

145. *David Maraga: The Brave Judge Who Made Kenyan History*, BBC (Sept. 2, 2017), <https://www.bbc.com/news/world-africa-41123949> [<https://perma.cc/L2EP-BF8B>] (“[Chief Justice]

from assault from the President.¹⁴⁶ The Kenya Magistrates and Judges Association issued a statement condemning the assault on the decisional independence of the judiciary and took “great exception” to President Kenyatta’s remarks.¹⁴⁷ Like in Malawi’s case in 2020, national and international opinion came decidedly on the side of the judiciary for the courageous decision. President Uhuru Kenyatta’s threats to ‘revisit’ the Supreme Court’s nullification of his 2017 election continued many years later. His government brought charges against the Deputy Chief Justice that have never been proven. The Deputy Chief Justice’s bodyguard was attacked in a gun incident thereafter. President Uhuru Kenyatta, who won the repeat election boycotted by the opposition thereafter, declined to appoint forty-one judges that had a composition that he perceived as being rigged against him, even though they were vetted and approved by the Judicial Service Commission. The President successfully managed to change the composition of the Judicial Service Commission in such a manner that by mid-2021, he appointed those judges he had declined to appoint, except six who were widely perceived as independent.¹⁴⁸ In addition, he appointed a new Chief Justice who is widely regarded as more accommodating of the President. The lesson from Kenya is therefore that mega-political electoral disputes that leave an incumbent in place will result in placing constraints on the continued independence of the judiciary. In Malawi by contrast, when the incumbent President lost in the repeat election, the backlash against the judiciary ended with his Presidency.

V

CONCLUSION

The fact that three of Africa’s most active international courts have accepted to decide election disputes from national elections raises the question of why international courts in Africa are intruding into what are regarded as politically sensitive disputes. For African governments, these disputes fall within the exclusive jurisdiction of their national courts. In our view, part of the explanation lies in the strategic ways that opposition politicians and political parties, including those who do not pose viable electoral challenges to incumbent pres-

Maraga and his thugs have decided to cancel the election.”); Boniface Mwangi, FACEBOOK (May 13, 2021), <https://www.facebook.com/BonifaceMwangiBM/videos/2017-a-drunk-president-uhuru-kenyatta-while-scratching-his-ass-called-the-judici/1124576081390152/> [<https://perma.cc/Q97A-QBD5>].

146. See Mercy Asamba, *Law Society of Kenya Condemns Uhuru’s Threatening Remarks on Judges*, STANDARD (Sept. 2, 2017), <https://www.standardmedia.co.ke/counties/article/2001253386/lsc-cautions-uhuru-on-remarks-against-supreme-court-judges> [<https://perma.cc/D4JY-4Y4T>] (documenting the Law Society of Kenya’s statement terming President Uhuru’s attack towards the judiciary inappropriate and unconstitutional).

147. Tom Odula, *Kenya President Warns Judiciary After It Nullifies Election*, SPOKESMAN-REV. (Sept. 2, 2017), <https://www.spokesman.com/stories/2017/sep/02/kenya-president-warns-judiciary-after-it-nullifies/> [<https://perma.cc/X9JE-XR3F>].

148. Betty Njeru, *President Uhuru Appoints 34 Judges, Leaves Out Six*, STANDARD (June 3, 2021), <https://www.standardmedia.co.ke/national/article/2001414721/uhuru-appoints-34-judges-leaves-out-six> [<https://perma.cc/Y25B-V2N5>].

idential or gubernatorial candidates, have managed to persuade Africa's international courts to become involved in those disputes. The cases we have examined in this article come from countries with political systems that have been in the process of establishing competitive political systems in the last few decades. Though these political openings have varying degrees of openness to political competition, they are weak. The availability of international courts offers these opposition politicians and parties opportunities to challenge abuses of electoral processes. In so doing, international courts offer litigants bringing electoral grievances to continue their electoral politics outside the electoral and judicial system controlled by incumbent governments and dominant political parties. Opposition politicians and parties have capitalized on the openings initially created by civil society groups to litigate human rights cases before these international courts. For example, in East Africa, the cause of action that has opened the door to election related human rights violations was first created in the context of human rights cases that had nothing to do with elections. In West Africa, the ECOWAS Community Court of Justice crafted the *Ugokwe* doctrine, under which the court will dismiss jurisdictional and admissibility challenges as long as a case pleads treaty violations that fall within the jurisdiction of an African international court. In so doing, opposition politicians and political parties drag governments and incumbent political parties before these international courts where they have to defend their conduct.

Therefore, opposition political parties and politicians file cases in international courts as part of their strategy of involving them as one of the forum among others in their struggle with incumbent politicians and political parties in their home countries. They litigate these cases not necessarily to win. Rather, these cases are in part designed to dodge weak national judicial systems that are not sufficiently independent of incumbent politicians who control national electoral systems. Since incumbent governments have to come to court to defend themselves from allegations brought by opposition political parties and politicians, they provide opposition candidates opportunities to embarrass governments and incumbents who cheat in elections. The case and their positive outcomes also open possibilities for these politicians and their opposition parties to mobilize favorable press coverage and therefore to keep opposition supporters mobilized and hopeful. They are the modest harvests Africa's international courts produce to use a term first used by Obiora Okafor.

All the cases discussed above show that the impetus to judicialize election disputes arises from organized political forces at the domestic level, not from international court judges. In other words, these cases are propelled by oppositional politicians and political parties who share the same concerns about the unevenness and unfairness of electoral competition in their countries. Litigants bringing these cases are often in contention with entrenched political leaders or dominant political parties abusing their power over the national electoral process. In bringing these cases, opposition politicians and political parties draw attention and magnify the salience of electoral injustices and force incumbent governments to respond. The cases also give these plaintiffs opportunities to

challenge exclusionary electoral practices of dominant parties and politicians in a forum that they do not control. By filing these cases, plaintiffs call attention to issues of electoral integrity and how dominant political parties have superior access to state resources and campaign funds, as well as how this in turn makes political competition in elections very difficult for opposition parties and politicians.

It is crucial to note that all three international courts examined in this article assume jurisdiction to adjudicate electoral disputes. They do so on the theory that they can decide these cases because they raise treaty violations that fall within their jurisdictional remit, even though they would otherwise be properly determined in domestic courts. From this perspective, the judges of these international courts, like African governments and incumbent political parties, become engaged as active participants and partners with those bringing these cases, in the judicialization of election disputes.